

EXHIBIT A



Deposition of:
Peyton McCrary , Ph.D.

May 22, 2020

In the Matter of:
**Fair Fight Action, Inc., Et Al. v.
Raffensperger, Brad, Et Al.**

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FAIR FIGHT ACTION, INC., et
al.,

Plaintiffs,

CIVIL ACTION FILE

vs.

NO. 1:18-cv-05391-SCJ

BRAD RAFFENSPERGER, in his
official Capacity as Secretary
of State of Georgia, et al.,

Defendants.

DEPOSITION OF
PEYTON MCCRARY, PhD
TAKEN BY REMOTE VIDEOCONFERENCE
May 22, 2020
9:41 a.m.
Arlington, Virginia
Robyn Bosworth, RPR, CRR, CRC, CCR-B-2138

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1 MR. TYSON: This will be the deposition of
2 Dr. Peyton McCrary taken by Defendant, Brad
3 Raffensperger, for purposes of discovery and all
4 purposes allowed under the Federal Rules of Civil
5 Procedure. And given that we are conducting this
6 via Zoom, we have a stipulation first that this is
7 taking place remotely but will be treated as if it
8 was under oath and in the same room. And is that
9 acceptable to y'all?

10 MS. FINK: Yes.

11 THE WITNESS: Yes.

12 MR. TYSON: And all objections except
13 those going to form and responsiveness and privilege
14 we'll reserve until trial or first use. Is that
15 also acceptable, Sarah?

16 MS. FINK: Yes.

17 MR. TYSON: All right. If you could
18 please swear the witness.

19 THE REPORTER: Before I swear the witness,
20 could I get a stipulation from all counsel that the
21 court reporter is allowed to give the oath remotely?

22 MS. FINK: Yes.

23 MR. TYSON: Yes, on behalf of defendants.

24 PEYTON MCCRARY, PhD.,
25 having been first duly sworn, was examined and

1 testified as follows:

2 EXAMINATION

3 BY MR. TYSON:

4 Q Good morning, Dr. McCrary. My name is
5 Bryan Tyson. I represent the defendants in this
6 case, and I look forward to talking with you today
7 about your report in this case. I'm assuming that
8 you've been deposed any number of times before; is
9 that correct?

10 A Yes.

11 Q And so you're familiar with our basic
12 ground rules. Talking over each other gets a little
13 bit complicated with the virtual platform, but we'll
14 do our best to start a question, and I'll pause to
15 wait for your response; having yes and no answers as
16 opposed to uh-huh or huh-uh; we obviously, just like
17 in a normal deposition, can take breaks as needed,
18 and my only request is that we answer the last
19 question I posed prior to taking a break. Both
20 Ms. Fink and Mr. Kaiser have been in enough
21 depositions, and Leslie too, with me to know that
22 when -- sometimes I ask a question that makes
23 absolutely no sense, and I get to the question mark,
24 and I have no idea what I'm asking, you have no idea
25 what I'm asking. If that happens, just let me know,

1 and I'll work to rephrase it. Will that work for
2 you?

3 A Yes.

4 Q Okay.

5 And so just to put on the record as well
6 how we're handling the depositions, the kind of
7 formal introduction of the depositions will be
8 through the exhibit share platform that the court
9 reporting service has provided, but all counsel has
10 PDF copies of what will be uploaded through that.
11 Dr. McCrary, you have received paper copies of those
12 as well. And, Dr. McCrary, have you reviewed any of
13 the paper exhibits prior to the start of the
14 deposition today?

15 A No.

16 MS. FINK: Just if I can I'll just put on
17 the record that when Dr. McCrary received all the
18 exhibits, he opened them up to take out the folders.
19 There was one document that was not in a folder, so
20 he saw what that was. He told me about that. I
21 instructed him not to talk to me about it anymore,
22 and that was the extent of our conversation about
23 it.

24 MR. TYSON: Got it. Thank you for that.
25 We were trying to manage putting those together

1 across multiple people with a skeleton staff at the
2 office, so I apologize for that, so thank you.

3 MS. FINK: Yes.

4 BY MR. TYSON:

5 Q Dr. McCrary, what I'm planning to do today
6 is just start out with some background information
7 about your involvement in the case, kind of what you
8 did to get ready for the deposition today. We'll
9 talk through that, we'll move into your CV and
10 biographical background materials, and then we'll
11 move into your report in the case.

12 So if we can go ahead and start this
13 morning by you telling me what you did to get ready
14 for your deposition today.

15 A In the immediate background let's say this
16 week I reviewed my report, I reviewed some of the
17 documents I had referenced in the report.

18 Q Okay. And beyond some of the documents in
19 the report and your report, did you review any other
20 documents to get ready for your deposition today?

21 A Not that I recall.

22 Q Okay. And I know we'll get into this with
23 the report officially, but you're being compensated
24 at a rate of \$300 an hour; is that correct?

25 A Yes.

1 Q Do you know approximately how much you
2 billed in this case so far?

3 A I do not.

4 Q Do you have an estimate of how many hours
5 you spent preparing your report?

6 A I don't really have an estimate on the tip
7 of my tongue. It was a lot of time.

8 Q Have you sent a bill to the plaintiff
9 counsel at this point in the case?

10 A Yes.

11 Q And do you recall approximately how much
12 the bills that you sent would be?

13 A No, because I was instructed to bill
14 monthly, and I did so. So there were --

15 Q Okay.

16 A -- numerous monthly invoices.

17 Q Got it. And I'm assuming you've been paid
18 on those invoices as well?

19 A I'm sorry, repeat your question.

20 Q Certainly. I'm assuming you've been paid
21 on those invoices as well?

22 A Yes.

23 Q Okay. All right. We are going to see how
24 this works. I'm going to just review, Dr. McCrary,
25 document 01, which is just a Notice of Deposition.

1 A Yes.

2 Q Okay. Give that for the record.

3 (Defendant's Exhibit 1 was marked for
4 identification.)

5 BY MR. TYSON:

6 Q So let's go ahead and start about the
7 lawsuit. How did you first hear about the Fair
8 Fight Action case?

9 A My recollection is I was contacted by
10 Sarah Fink, and she told me the basic outlines of
11 the case they had filed and asked if I would
12 consider working on it.

13 Q And do you recall approximately when that
14 conversation would have taken place?

15 A My recollection is that the initial
16 conversation took place in November of 2018.

17 Q And did you begin working on your report
18 immediately at that point, or was there a gap in
19 time from the time you initially were contacted to
20 the time you began working on your report?

21 A There were two or three months, I think,
22 before I was provided with a retainer agreement and
23 began working on the case.

24 Q Now, did plaintiff's counsel provide you
25 with any data or documents that you used in

1 preparing your report?

2 A Yes.

3 Q And what were those data or documents --
4 and document?

5 A Well, to the best of my recollection, of
6 course, I received the complaint in the case, and
7 during the last phase of the case I received copies
8 of reports of other experts retained by the
9 plaintiffs, although that was -- that was pretty
10 late in the preparation of my report. And I had a
11 paralegal at KaiserDillon, who was assigned to serve
12 as a research assistant, who sent me various
13 documents with -- at my request with links to
14 legislative documents and other documents from the
15 Secretary of State's office, that sort of thing.
16 And that's about all I recall.

17 Q So we have the complaint, the reports of
18 the other experts. And then in terms of the
19 research assistant role who was assisting you, what
20 would a request look -- would you ask for specific
21 categories of documents, or what role did the
22 research assistant play, I guess, is what I'm really
23 asking versus what research you did?

24 A Right. I requested particular categories
25 of documents, and some of the time he was able to

1 find them, and some of the time he was not. Much of
2 the research is research that I undertook myself.

3 Q Now, have you read any of the -- well, I'm
4 assuming you've read the complaint in this case,
5 correct?

6 A Yes.

7 Q And have you read any of the other
8 pleadings filed in this case?

9 A I don't recall seeing any of the
10 pleadings. There were a couple of orders, such as a
11 discovery schedule order and that sort of thing that
12 were provided to me, but I don't recall looking at
13 pleadings in the case.

14 Q Okay. And throughout your report you also
15 reference sets of documents that were produced by
16 the Secretary of State's office to the plaintiff in
17 the litigation. Did you receive those through the
18 kind of research assistant process you described,
19 you would ask for documents related to something and
20 were provided those, or did you receive them some
21 other way?

22 A My recollection is that Sarah Fink
23 provided most of the documents that were received
24 through discovery.

25 Q Okay. And are there documents that were

1 part of the discovery documents that you reviewed
2 but did not reference in your report?

3 A Oh, yes, there were a lot of discovery
4 documents that I received, and only -- only some of
5 them seemed relevant for the -- for the analysis
6 that I was doing. Well, they were -- often
7 documents were relevant in the sense that they
8 provided a broader context but were not -- not
9 things that needed to be cited as evidence in the
10 report.

11 Q So then you just personally made the
12 decision after reviewing those documents as to which
13 document to include -- reference in your report and
14 which ones not to, that was your decision?

15 A Oh, yes.

16 Q Did plaintiff's counsel ask you to make
17 any assumptions in the process of preparing your
18 report?

19 A No.

20 Q So in your own words, could you describe
21 to me what you believe the Fair Fight Action case is
22 about?

23 A Well, let me begin with the portion of the
24 case that I referenced in my report. There were a
25 lot of different aspects of the Georgia voter

1 verification process and other aspects of the way in
2 which the Secretary of State's office administered
3 the registration process that I did not address in
4 my report. I have, however, seen documents relating
5 to a wide variety of the other issues that were
6 raised in the complaint by Fair Fight -- by Fair
7 Fight Action.

8 Q Okay. Thank you. I appreciate that.

9 Could you describe to me globally, though,
10 your understanding of what the case as a whole is
11 about, not your specific portion?

12 A Well, it's concern with the claim that
13 aspects of the state's administration of the
14 registration process that have a racially
15 discriminatory effect and therefore would violate
16 either Section 2 of the Voting Rights Act, or I
17 think there were constitutional claims as well.

18 Q Okay. Thank you.

19 In terms of some of the specific documents
20 that you reviewed, did you review preclearance
21 submissions as part of the preparation of your
22 report?

23 A Yes, that was a category of documents I
24 requested early on.

25 Q And did you review any e-mails from the

1 Secretary of State's office as part of the
2 preparation of your report?

3 A There probably were some. I don't
4 remember that there was a large volume of them.

5 Q Do you recall when you last received
6 documents from plaintiff's counsel that had been
7 produced by the defendants that you relied on in the
8 preparation of your report?

9 A Well, you're really asking two questions.

10 Q Okay. I can try it again. Let's do it
11 this way: When did you receive the last set of
12 documents from the plaintiff's counsel that were --
13 that were subcategory of documents produced by the
14 defense that you relied on in the preparation of
15 your report?

16 A You're still asking two questions. One,
17 when I received them, and the other was you were
18 restricting it to particular category, documents
19 that I relied on. It seems to me that's two
20 different questions.

21 Q Okay. I'm trying to use the documents you
22 rely on and modifying the when did you receive. I'm
23 asking only as to the subset of documents produced
24 by the defendants. So to category one, also
25 documents that you relied on that were produced by

1 the defendants, when did you last receive those
2 categories of documents -- documents that fit in
3 those categories?

4 A It was pretty recent, but I don't recall
5 an exact date, but it was certainly in 2020.

6 Q Okay. As part of the research for your
7 report, did you speak with anyone other than
8 plaintiff's counsel to -- in Georgia?

9 A Not that I recall.

10 Q Okay. So you didn't talk to any voter
11 registrars or election officials as part of the
12 preparation of your report?

13 A No.

14 Q Let's turn next to your CV. Ms. Fink
15 yesterday sent a revised CV from May 2020. Do you
16 have a copy of that document?

17 A I don't have it in front of me.

18 Q Okay.

19 MR. TYSON: Let's do this then. Sarah, is
20 that something you could forward to Dr. McCrary just
21 so we're talking about all the same documents at
22 once?

23 MS. FINK: Absolutely. Do you have your
24 e-mail open and I can forward it to you,
25 Dr. McCrary?

1 THE WITNESS: I think I just messed up our
2 Zoom connection by trying to access it.

3 MS. FINK: We see you fine.

4 MR. TYSON: We can still see you fine.

5 THE WITNESS: I see nobody. I'm sorry.

6 MS. FINK: Can we go off the record for a
7 minute and just try to fix this?

8 MR. TYSON: We'll do that.

9 (Off-the-record discussion.)

10 MR. TYSON: For purposes of clarity here,
11 we've marked as Exhibit 2 the updated CV, the
12 changes to which Dr. McCrary has made to his CV.

13 (Defendant's Exhibit 2 was marked for
14 identification.)

15 MR. TYSON: We are going to now mark as
16 Exhibit 3 Dr. McCrary's report, which also includes
17 a prior version of his CV, and he's aware of the
18 differences there, and we can discuss those as
19 needed.

20 (Defendant's Exhibit 3 was marked for
21 identification.)

22 BY MR. TYSON:

23 Q I don't expect the questions will involve
24 anything that's changed, Dr. McCrary.

25 So Exhibit 3 is titled Expert Report of

1 Dr. Peyton McCrary. I'm assuming you're familiar
2 with this document, correct?

3 A Yes.

4 Q And so at the end of this document Exhibit
5 1 is your CV that was filed with the report, and on
6 the PDF it's page 103, but it's six pages from the
7 end, Dr. McCrary, in the paper version.

8 A I see it.

9 Q And as we've discussed, the most recent
10 version of your CV we've marked as Exhibit 2, but
11 for convenience we're going to work off of the CV
12 attached to Exhibit 3, correct?

13 A Yes.

14 Q Now, kind of getting started on your
15 background, I ran across another version of your CV
16 in another case that mentioned that you were
17 originally from Danville, Virginia; is that correct?

18 A That's correct.

19 Q And that's funny to me because I've been
20 reading through Taylor Branch's history of the civil
21 rights movement and recognized Danville. I had not
22 heard of Danville except there was a Student
23 Nonviolent Coordinating Council protest there in
24 1963. Are you familiar with that incident?

25 A Yes.

1 Q And were you in Danville at that time?

2 A I was.

3 Q Were you involved at all in the operations
4 that were happening then?

5 A No.

6 Q Okay. Do you have any familiarity with
7 the Danville city officials that were involved at
8 the time, the police chief McCain or Mayor Stinson?

9 A I remember who they were. That's the
10 extent of what I recall from reading the newspaper.

11 Q Okay. If we could begin with your
12 educational background. If you could just maybe
13 give me a brief summary of your educational history.

14 A I went to the public schools in Danville,
15 Virginia, where I graduated from high school in
16 1961. I was an undergraduate at the University of
17 Virginia and received my BA in 1965. I stayed for
18 an additional year and took a master's degree in
19 1966, and then I went to Princeton, where I
20 completed my PhD degree in 1972.

21 Q Great. And for your master's at UVA, what
22 was the topic of your thesis; do you recall?

23 A Yes. John Spencer Bassett: The Scholar
24 as Social Critic.

25 Q The scholar and social critic, you said?

1 A Scholar as social critic.

2 Q Got it.

3 And was there -- do you recall any
4 references to Georgia in that thesis?

5 A No.

6 Q Now, for your PhD at Princeton, what was
7 the topic of your dissertation there?

8 A Title of the dissertation was Moderation
9 in the Revolutionary World: Abraham Lincoln and
10 Reconstruction in Louisiana. That's an
11 approximation. I may have gotten the subtitle
12 wrong.

13 Q It refers to Louisiana. I'm assuming that
14 was the primary focus of the work?

15 A That's correct.

16 Q Okay. You mentioned that you are
17 currently teaching at George Washington University
18 Law School. What does the role of professional
19 lecturer mean?

20 A Professorial lecturer is the term that the
21 university gives to adjunct faculty members.

22 THE REPORTER: Adjunct faculty...

23 THE WITNESS: Adjunct faculty.

24 MR. TYSON: Members.

25 BY MR. TYSON:

1 Q And so what courses are you currently
2 teaching at George Washington Law School?

3 A The only course that I've taught there is
4 a course I co-teach with a former colleague in the
5 voting section of the Department of Justice, a
6 course on the voting rights law.

7 Q Who is that former colleague from the
8 Department of Justice?

9 A Stephen Pershing.

10 Q And is it correct that the topic of your
11 class on voting rights law does not involve the area
12 of election administration?

13 A No.

14 Q What parts of election administration are
15 addressed in your voting rights law course?

16 A Well, first of all, we talk about cases
17 involving voter registration before 1965,
18 particularly from Smith versus Allwright, through --
19 through the cases in 1961, '65, and election
20 administration was the primary focus of those cases.

21 Additionally, we discussed election
22 administration in the context of explaining the
23 evolution of the operation of Section 5 of the Voter
24 Rights Act on the preclearance reviews by the
25 Department of Justice or in lawsuits that -- some of

1 which dealt with election administration.

2 In addition, we give close attention in
3 the last part of the course to several recent cases
4 involving election administration issues in various
5 states.

6 Q And is your teaching role as one of the
7 co-teachers in that class focused on the historical
8 components?

9 A Well, first of all, you recall that I am
10 not an attorney, but if you hang around voting
11 rights lawyers for about 40 years you pick up a
12 little law, and so I confess that I often discuss
13 the evolution of case law, but one of the focus --
14 one focus that I try to bring to the course is to
15 explain how the fact-finding in voting rights in
16 election law cases develops the role of expert
17 witnesses in cases, the sort of empirical issues the
18 courts had to address, and how the courts have
19 addressed those issues.

20 So I wouldn't characterize that
21 necessarily as historical, but it's certainly --
22 certainly deals with social science as well as how
23 litigation is conducted. We actually try to teach
24 law students how litigation operates.

25 Q That sounds fascinating. I'm assuming in

1 the course of that as part of your course you're
2 obviously teaching about several cases from Georgia
3 in that Voting Rights Act litigation experience; is
4 that correct?

5 A Yes. Certainly.

6 Q So let's take a look at your publications
7 in your CV. We'll begin with that. And I was
8 looking just kind of at the list, and seems to be a
9 lot about Alabama and Florida, and I was looking for
10 some Georgia-specific items, and I found three, and
11 I wanted to make sure I've got that right and
12 haven't missed something.

13 So the first one on page 3 of the CV is an
14 analysis of the -- of Georgia state senate
15 redistricting in 1962, top of page 3. Are you with
16 me on that?

17 A Yes.

18 Q And that was a publication that involved,
19 obviously, looking at the state of Georgia, correct?

20 A Yes.

21 Q And the next item on that page, The
22 Dynamics of Minority Vote Dilution: The case of
23 Augusta, Georgia, is a study from 1946 through 1986
24 that involved Georgia, correct?

25 A Yes.

1 Q And in your report you mentioned the end
2 of preclearance as we know it where you recounted
3 facts involving Georgia legislative redistricting in
4 2001. Do you recall that paper?

5 A Yes.

6 Q Okay. Are there any other publications
7 you looked at on your CV that involve Georgia
8 elections that I've missed out of those three?

9 A Yes, a Law Review article that is listed
10 immediately following, The End of Preclearance to
11 which you referred, Bringing Equality to Power: How
12 the Federal Courts Transformed the Electoral
13 Structure of Southern Politics, 1960 to '90, which
14 was published in the University of Pennsylvania
15 Journal of Constitutional Law in 2003.

16 Q Got it.

17 Okay, so we've added that one, so we're at
18 four. Are there any other publications you have
19 published that involve Georgia?

20 MS. FINK: Dr. McCrary, if you need time
21 to read through the list of publications to think
22 about whether they involve Georgia, you should take
23 the time to do that.

24 THE WITNESS: That's what I was doing.

25 MS. FINK: Good.

1 BY MR. TYSON:

2 Q Please take your time.

3 A There is a book chapter called the Law of
4 Preclearance which was published in collection of
5 essays entitled, The Future of the Voting Rights Act
6 published by Russell Sage in 2006, which is -- which
7 is essentially an excerpt from the Law Review
8 article in which we were asked to present the
9 empirical evidence regarding objection decisions
10 that we had -- we had previously discussed in the
11 Law Review article, and that also necessarily deals
12 with some of the Georgia facts.

13 Q Any others you can identify? Please take
14 your time. Don't rush.

15 A I'm trying to recall. I'm pretty sure
16 there were also some Georgia cases discussed in an
17 article entitled -- Law Review article again called
18 Keeping the Courts Honest: The Role of Historians
19 as Expert Witnesses in Southern Voting Rights Cases.

20 Actually, now that I think about it,
21 there's also Georgia material in the Law Review
22 article listed immediately below that,
23 Discriminatory Intent: The Continuing Relevance of
24 Purpose Evidence in Vote-Dilution Lawsuits published
25 in the Howard Law Journal in 1985.

1 I think there's also some discussion of
2 Georgia expert witness reports in a journal article
3 entitled, Racially Polarized Voting in the South:
4 Quantitative Evidence from the Courtroom, published
5 in Social Science History in 1990 and listed on page
6 3 of the CV.

7 And there's also, now that I think about
8 it, in a review in -- review essay that I published
9 that's listed on page 3 entitled, Race and
10 Misrepresentation: Review of Maurice T. Cunningham,
11 Maximization, Whatever the Cost: Race,
12 Redistricting, and the Department of Justice,
13 published online in a online journal known as H-Net
14 in 2002. I think that's all.

15 Q Okay. Excellent. Thank you for taking
16 the time for looking at that. I appreciate that.

17 So on page 3 there before we get into some
18 of these others, I see you have a review essay,
19 Without Fear and Without Research: Abigail
20 Thernstrom on the Voting Rights Act, from 1988. Do
21 you see that entry?

22 A Yes.

23 Q And was that referring to Dr. Thernstrom's
24 book, Whose Vote Counts?

25 A Yes.

1 Q And I'm guessing from the title of your
2 review that you were critical of the book; that a
3 fair statement?

4 A That's correct.

5 Q Do you recall calling Dr. Thernstrom's
6 work careless in that review?

7 A I don't remember whether I used the word
8 "careless," but I'm sure I made comments that would
9 be synonymous with it.

10 Q Do you recall saying that Dr. Thernstrom's
11 work was, quote, crafted to serve a conservative
12 political agenda?

13 A I don't recall those words, but it's
14 consistent with what I think Pam Karlan and I said
15 in the review.

16 Q Do you personally oppose Dr. Thernstrom's
17 conservative political agenda?

18 A Do I personally oppose her conservative
19 agenda?

20 Q Yes.

21 A Well, actually, Abby and I knew each other
22 pretty well, and we were on good terms even in the
23 last year -- years of her life. And I didn't agree
24 with her about the -- portions of her ideology in
25 her publications, but the primary focus of that

1 review was the carelessness of her scholarship and
2 the way in which she distorted evidence to fit her
3 ideological views. It wasn't a critique of her
4 views so much as it was a critique of her
5 scholarship.

6 Q Thank you.

7 Let's take a look at one of the
8 Georgia-specific publications we had, The End of
9 Preclearance as We Knew It. That is document 3 for
10 you, 03.

11 A Okay. We need to refer to the CV anymore
12 or should I put it back in the folder?

13 Q We're going to be coming back to it. The
14 report you probably want to hang on to since we're
15 going to need to come back to that as we go. I'm
16 going to try to minimize bouncing between exhibits
17 as much as I can.

18 A What did you tell me to refer to, which
19 exhibit?

20 Q Document 03, which we'll mark as Exhibit
21 4.

22 (Defendant's Exhibit 4 was marked for
23 identification.)

24 A Yes.

25 BY MR. TYSON:

1 Q It's the article, The End of Preclearance
2 as We Knew It.

3 A Yes, I have it.

4 Q Is this the article that you authored
5 that's referenced on your CV in 2001? I'm sorry.

6 A It appears to be the article. It's a
7 different format from the original, but it appears
8 to be a copy of the article or the article.

9 Q Okay. So obviously I know it's relatively
10 lengthy. Do you recall where in the article you
11 discussed Georgia's legislative districting?

12 A So I can look through and find all the
13 references to Georgia if that's --

14 Q That might be -- sorry, I might be able to
15 assist you. If you go to page 36.

16 A I'm looking at page 36.

17 Q So that first paragraph, maybe about fifth
18 line down that begins: Thus, the majority in
19 Georgia versus Ashcroft, can you see that?

20 A Yes.

21 Q And do you personally agree or disagree
22 with the court's opinion in Georgia versus Ashcroft?

23 A Agree or disagree is not the way I would
24 couch it. What we said in the article and what I
25 think is that it was an opinion that would create a

1 standard for enforcing Section 5 of the Voting
2 Rights Act that would be administratively difficult
3 and confused and called for things that had
4 previously not been regarded as suitable evidence in
5 a Section 5 review, including the political party
6 controlling the legislature and the role of the
7 party control of the legislature in putting
8 African-American legislators in committee
9 chairmanships, which is not the kind of thing we had
10 ever been authorized to look at under Section 5.

11 It also instructed the Department of
12 Justice or the federal courts to consider the
13 creation of influence districts, which had never
14 been a part of a Section 5 review, and, in fact,
15 it's a concept that political scientists regard as
16 a -- a very sloppy category of districting to
17 examine with little empirical -- little empirical
18 definition, and so it seemed a particularly bad
19 idea.

20 So I was -- I was critical of -- we
21 were -- my co-authors and I were critical of the
22 decision because it seemed to create a lot of
23 confusion in the standards for administering the
24 preclearance review of voting changes.

25 There were some aspects of it that seemed

1 to have some appeal. You know, it suggested
2 attention to things that are of interest, but it was
3 difficult for me or for anyone in the voting section
4 to figure out how the heck to administer Section 5.

5 And, of course, the case was remanded and
6 we were struggling with that, and it appeared to
7 call, among other things, for legislative roll-call
8 analysis of voting behavior in the legislature in
9 the case of a redistricting decision which meant
10 that we had have to use a totally different kind of
11 expert. So there were a lot of administrative
12 problems with the standard that the court had
13 announced in Georgia versus Ashcroft.

14 Q Thank you. And that actually kind of
15 leads to what I was going to ask you about. On the
16 next page on page 37, footnote 229 makes reference
17 to what you just described as the issue of looking
18 at the legislative influence of African-American
19 legislators. Are you with me on that footnote? And
20 it says: In Georgia, as in most states, the party
21 which provided the most leadership opportunities for
22 representatives elected by minority voters was the
23 Democratic Party, and references Dr. Karlan. Thus
24 under this new view of retrogression, evidence that
25 a plan maintained or enhanced the chances that

1 Democrats would control the state senate would
2 presumably enhance the likelihood of preclearance.

3 Do you see that language?

4 A Yes.

5 Q And so based on what you've described
6 earlier, your main concern with this new review that
7 the Supreme Court was requiring in Ashcroft was the
8 administerability of it from the voting section's
9 view; is that a fair statement?

10 A And the federal courts.

11 Q Did you have concerns about the
12 constitutionality of engaging in this kind of
13 exercise that would involve partisan line --
14 partisan engagements in preclearance analyses?

15 A Yes, but I'm not sure exactly what you
16 mean by the question. I mean, it seemed to me that
17 this was -- this was something that had never been a
18 part of Section 5 review, and it seems to invite a
19 kind of partisan decision-making which we had always
20 tried to avoid.

21 Q Do you have a personal opinion on whether
22 or not the leadership opportunities for
23 representatives elected by minority voters should
24 have been part of a preclearance review?

25 A Yes, I don't think it should be part of

1 the preclearance review.

2 Q Okay. And those Georgia plans on the next
3 page of footnote 235 you note were later found
4 unconstitutional on the one-person, one-vote
5 principle, correct?

6 A Where are you referring me to?

7 Q Page 38, footnote 235.

8 A Yes.

9 Q And so ultimately the department didn't
10 have to answer those questions as to those Georgia
11 plans; is that fair?

12 A That's correct.

13 Q And then is it your understanding that
14 Georgia versus Ashcroft was overturned by statutory
15 changes in the 2006 renewal of the Voting Rights
16 Act?

17 A I wouldn't use the term "overturned."
18 Congress doesn't overturn courts' decisions.

19 Q So is it -- let me ask a better question
20 then. Is it your understanding that Georgia versus
21 Ashcroft is not applicable to preclearance in light
22 of the changes made by Congress in 2006?

23 A That's correct.

24 Q Thank you.

25 We can put that article away for now.

1 Actually, I shouldn't need to go back to that one.

2 Let's talk next about document 04, and
3 that is the document, Yes, but what have they done
4 to black people lately? from 1995.

5 A Yes.

6 Q I'm going to introduce -- mark that as
7 Exhibit 5.

8 (Off-the-record discussion.)

9 (Defendant's Exhibit 5 was marked for
10 identification.)

11 BY MR. TYSON:

12 Q Do you have that in front of you now,
13 Dr. McCrary?

14 A Yes.

15 Q Okay, great. Is this the article that was
16 referenced on your CV, Yes, But What Have They Done
17 to Black People Lately? The Role of Historical
18 Evidence in the Virginia School Board Case?

19 A Yes.

20 Q I guess I'd like for you to turn to the
21 third physical page, page 1276, in the Chicago-Kent
22 Law Review.

23 A In this copy there is no 1276. I go from
24 1275 to 1277.

25 Q Well, that's a problem. Let me do this,

1 is it correct to say that this article is an
2 analysis of what would be referred to as the Shaw
3 line of cases before the US Supreme Court?

4 A No.

5 Q And how would you explain what this
6 article was about then?

7 A This article was about the evidence in a
8 particular case which was initially styled Irby
9 versus Fitzhugh, I think, which challenged the
10 constitutionality of and I suppose the legality
11 under Section 2 of the Voting Rights Act of the
12 method of appointing elected school -- appointing
13 school boards, local school boards in the state of
14 Virginia.

15 Q If you could turn to page 1277, since I
16 know you have that one. First full paragraph on
17 that page begins: This article will examine the
18 historical evidence of discriminatory intent
19 presented by the plaintiffs in the Virginia school
20 board case and the basis on which courts minimized
21 the ultimate significance of this evidence.

22 Do you see that?

23 A Yes.

24 Q And you indicate that no court has
25 followed this precedent in deciding subsequent

1 lawsuits. Were you urging the adoption of the
2 precedent used in the Virginia school board case or
3 the rejection of that precedence?

4 A I'm sorry, could you rephrase that
5 question?

6 Q Certainly. So you're examining the
7 historical evidence of discriminatory intent
8 presented by the plaintiffs and the basis on which
9 the court minimized the evidence. I'm assuming in
10 general this article you're advocating against the
11 court's position in how it treated discriminatory
12 intent evidence; is that correct?

13 A Yes.

14 Q Okay. And you indicate that no courts
15 have followed this precedent in deciding subsequent
16 lawsuits. Are you aware of courts that have adopted
17 the precedents minimizing the ultimate significance
18 of intent evidence in other cases?

19 A I have to think about that for a moment.
20 I was, of course, writing this in the middle of the
21 1990s. I can think of cases since that time in
22 which courts have minimized the significance of
23 historical evidence, but it would take me a while to
24 go through and recall precisely which cases.

25 Q I don't want you to engage in that kind of

1 exercise.

2 Obviously you are a historian, have worked
3 in the Voting Rights Act area for a while. Is it
4 your personal belief that historical evidence is
5 critically important to intent analyses by courts in
6 voting cases?

7 A Well, historical evidence is a term that I
8 don't refer to with any chronological limits. In
9 other words, when I am analyzing recent history,
10 that's still historical analysis, and that's still
11 historical evidence. It seems to me that it depends
12 on the circumstances.

13 For example, in the Supreme Court decision
14 in Hunter versus Underwood and the earlier 11th
15 Circuit decision in that same case challenging the
16 petty crimes provision of the 1901 Alabama
17 constitution, the court was focused entirely on
18 things that happened in the period around the third
19 of the 20th century, and that was decision in which
20 then Associate Justice William Rehnquist voted with
21 his -- with the fellow members of the court in a
22 unanimous opinion based entirely on very old
23 historical evidence because it was relevant to the
24 facts at issue with the court on that case.

25 So there are occasions when going back a

1 very long time might be highly relevant, and I have
2 been involved in some of those cases myself, but I
3 also have the view that more recent historical
4 evidence can be much more probative than what
5 happened 50 or a hundred years ago. So, you know, I
6 interpret history very broadly.

7 Q Got it. Thank you.

8 So we can go ahead and put that one away.
9 Let's go next to another publication document 07
10 called, Keeping the Courts Honest.

11 A Sorry, it's 7?

12 Q Yes, sir.

13 A Okay.

14 Q So we'll mark this as Exhibit Number 6.

15 (Defendant's Exhibit 6 was marked for
16 identification.)

17 BY MR. TYSON:

18 Q And is this an article you published in
19 1989 involving the role of historians as expert
20 witnesses?

21 A Yes.

22 Q Okay. And so hopefully we have all the
23 pages here. If you could go to page 105, which is
24 the sixth physical page.

25 A Yes.

1 Q So about the middle of that page in the
2 paragraph that starts, "This sort of direct
3 expression." You with me on that?

4 A Yes.

5 Q You note about halfway through that
6 paragraph: Evidence of discriminatory intent is
7 most commonly found in newspapers. Opposing counsel
8 normally objects to newspapers, particularly if less
9 than 20 years old, as hearsay evidence.

10 Do you see that statement?

11 A Yes.

12 Q You obviously use newspaper accounts in
13 your analysis here and in other cases; is that
14 correct to say?

15 A Yes.

16 Q And this is one of the tools of a
17 historian is to be able to look at newspaper
18 accounts; is that a correct statement?

19 A Yes. It's not restricted to historians,
20 but yes.

21 Q Okay. And when you're doing research
22 involving newspapers, how do you locate the
23 newspapers that you are going to consult? Is it
24 print only? We have so many ways of delivery now.
25 Is there a particular method that you use in your

1 research process?

2 A Well, the access to newspapers has evolved
3 over time, as I'm sure you know. Back in the 1980s
4 when this article was written and when I was
5 testifying in a variety of cases I had to read
6 newspapers on microfilm, and sometimes I had to
7 travel to the field to analyze them. In fact,
8 usually that was necessary.

9 Nowadays I have access through my GW
10 University connection to an online database of
11 newspapers and newspaper articles known as NewsBank,
12 which I also was able to use during my time in the
13 Department of Justice, and so sitting at my desk I
14 can access newspapers rather than traveling to
15 Mississippi or Georgia or Montana or wherever to
16 read newspapers.

17 There is also the possibility of
18 identifying newspapers through an Internet browser
19 sometimes, and so some of the time I can locate
20 newspaper articles that way, so it just depends.

21 You also asked about a current trend in
22 journalism for online newspapers, and that is also a
23 source of access. For example, I think it's -- I
24 may -- it may be a coalition of the newspapers in
25 Alabama which has an online publication called

1 AL.com. It's an online version. I think it's
2 probably the Montgomery Advertiser and Birmingham
3 News, but I'm speculating there.

4 So there are online journalism sources all
5 over the place nowadays in addition to the
6 searchable database, which includes things that were
7 originally in print.

8 Q Thank you. That's very helpful.

9 So what methodology do you use as a
10 historian to determine what newspaper accounts are
11 relevant when you're doing an analysis and which
12 ones are irrelevant?

13 A Well, of course, it depends on the
14 questions you're asking. If, for example, I'm
15 analyzing the adoption of a statute, I focus on
16 stories, reports, news reports covering the
17 operations of a state legislature at the time the
18 statute was under consideration.

19 If I'm talking about the administration of
20 elections, for example, I would often be looking at
21 newspaper coverage of things that a state agency
22 did, as in this case Secretary of State's office.
23 So it depends very much on what subject matter
24 you're investigating, but newspaper articles are
25 also useful as a what I usually refer to as a

1 pattern-searching device to find out things to
2 explore through other documents.

3 So the reason why newspapers were so
4 important in cases in the 1980s is that there's
5 virtually no legislative history record of state
6 legislatures other than the bare-bones account in
7 the journals of the legislature. So if you really
8 want to find out what's happening in the
9 legislature, you can't go to an official document,
10 and the best available evidence was usually
11 newspaper coverage of what the legislature is doing.

12 Of course, as with any documents, a social
13 scientist, such as an historian, has to analyze each
14 piece of evidence in context and compare what you're
15 finding in one document with other documents that
16 deal with the same subject matter.

17 So it's the kind of thing where an expert
18 social scientist -- social scientist who was
19 exercising his expertise or her expertise has to be
20 careful in using newspapers just like any other
21 document.

22 Q And so on -- later on that same page when
23 you say -- or the same paragraph when you say that
24 historians -- experts trained in the scrutiny of
25 such sources, and surely historians would rank first

1 among equals here, typically relies on such sources
2 in reaching a professional opinion, is that
3 essentially the process you're referring to you just
4 described, you have to review it and determine what
5 the relevance might be?

6 A Yes.

7 Q Turning to page 109, four or five pages
8 later.

9 A Yes.

10 Q Second full paragraph that begins: The US
11 Department of Justice has also made extensive use of
12 historians as expert witnesses in voting rights
13 lawsuits, do you see that language?

14 A Yes.

15 Q Besides you, were there other historians
16 working at the Department of Justice as expert
17 witnesses in voting cases?

18 A Well, at that time I was not working at
19 the Department of Justice. What I'm referring to
20 there is expert witnesses retained by the
21 department. And, for example, Morgan Kousser, an
22 historian at Caltech, was often an expert in voting
23 rights cases; Vernon Burton, who was then at the
24 University of Illinois, was another historian used
25 as an expert witness in a number of cases. There

1 were others, some of whom might have served only one
2 or two cases, but it was rather common.

3 Q When an historian was used in a Voting
4 Rights Act case, was -- had the determination
5 already been made that the department was going to
6 engage in litigation and the historian was brought
7 in to assist in building that case, or were
8 historians used in the analytical process prior to
9 the decision on whether to bring a case?

10 A Historians were not involved in the prior
11 decision-making. The department -- the court brings
12 out a lawsuit, carries out an extensive
13 investigation, and does not use consultants in that
14 period ordinarily, and certainly didn't in that
15 period, so all the historians would have been
16 retained after a case was filed.

17 Q And so was the historian essentially
18 helping paint the context, or were the historians
19 focused on discriminatory intent, or did it vary too
20 much case by case to say there was a consistent
21 practice?

22 A In the 1980s most of the cases where
23 historians were used were dealing with cases in the
24 South where there were judicial findings of the
25 history of discrimination effect on voting, and so

1 it was hardly necessary to have an expert historian
2 to document what the courts had already found.

3 So the ordinary practice was where the
4 department thought that there was an intent question
5 to be investigated, the department would retain an
6 historian to focus on the intent question, and that
7 was the primary role.

8 Though when cases involved states outside
9 the South where there was no body of judicial
10 findings regarding the history of discrimination,
11 such as in cases in the 1990s in Montana and in
12 South Dakota, historians were -- were retained to
13 document the history of discrimination affecting the
14 American Indians.

15 And there were probably other categories
16 of question where historians were used that I'm just
17 not recalling off the top of my head.

18 Q Thank you.

19 Let's keep moving through the article to
20 page 115, which is page 15 of the PDF.

21 A Yes.

22 Q At the bottom of that page you begin to
23 discuss a case from Edgefield County, South
24 Carolina. Do you see that section?

25 A Yes.

1 Q And you served as the plaintiff's expert
2 in that case on intentional discrimination; is that
3 correct?

4 A Yes.

5 Q And do you recall that the court
6 ultimately did not rule on the intentional
7 discrimination element of the Section 2 claim?

8 A That's my recollection.

9 Q And ultimately the court didn't decide
10 whether the testimony you gave or the testimony of
11 the defendant's expert, Dr. Belz, was credible,
12 correct?

13 A Sorry, defendant's expert who?

14 Q Dr. Belz, B-E-L-Z?

15 A Oh, Herman Belz.

16 The court made no credibility finding
17 about either expert, as I recall.

18 Q So on page 116, the next page over, you
19 relate the story of the defendant's expert
20 testimony. If you want to take a minute to review
21 that, I have a couple questions about that.

22 MS. FINK: What paragraph are you
23 referring to on page 116?

24 MR. TYSON: Page 116, the first two
25 paragraphs there are what I want to ask about.

1 THE WITNESS: I've read it.

2 BY MR. TYSON:

3 Q Okay. Thank you.

4 So when you say at the beginning of the
5 first full paragraph that had the defendants' expert
6 stopped there, his testimony would have been
7 credible, that's just referring to your assessment
8 of his testimony because the court never made a
9 credibility determination, correct?

10 A That's correct.

11 Q If you can turn to page 117, the last
12 paragraph on that page is what I'm interested in
13 here. And it lists -- and why don't you take a
14 minute to read it, and then I'll ask you about it.

15 A I've reviewed it, and I remember the
16 testimony, so go ahead and ask your question.

17 Q Excellent.

18 So you talk about a number of things that
19 you looked at, chain gangs, the athletic teams'
20 names, playing Dixie at a football game. In
21 preparing that kind of testimony, how did you
22 determine which community practices were relevant to
23 a question of racial intent in a voting case?

24 A Well, recall that you elicited the
25 information earlier in this deposition that I grew

1 up in Danville, Virginia. I was intimately familiar
2 with the southern racial etiquette of the time
3 period we're talking about, and any historian who's
4 written about the South would also be familiar with
5 that, even if that historian didn't grow up in the
6 South. So this is -- this is what would be
7 understood by almost anyone writing about the
8 history of the South in the 1960s and 1970s.

9 Q And in the process of looking for the
10 record of discriminatory continuing behavior by
11 county officials that you reference here, do you
12 also in your analysis search for nondiscriminatory
13 behavior, or do you limit your focus to locating
14 discriminatory behavior?

15 A Of course you look at all the purposes.
16 For example, there might be circumstances in which
17 there is a legitimate governmental interest in
18 taking some particular action that would justify it.
19 So you have to weigh racial considerations along
20 with other nonracial considerations in anything
21 you're analyzing.

22 Q What methodology are you using to make
23 that analysis? Obviously you're bringing your
24 background in the southern way of life as you
25 described in Danville. What methodology are you

1 using to determine whether there may be a legitimate
2 government purpose versus a racially discriminatory
3 purpose?

4 A Well, it has nothing to do with growing up
5 in the South. You were asking me specifically about
6 the racial etiquette facts that are referred to in
7 that paragraph when I made the comment about growing
8 up in Danville.

9 An historian is trained to analyze the
10 total context in which decisions are made, and that
11 includes all of the considerations that went into a
12 decision. That's what we normally -- that's what
13 we're trained to do in our education and taught to
14 do when we're conducting research. So even someone
15 that grew up in the North can analyze the South in
16 the 1960s and 1970s.

17 Q Have you ever heard the name of David
18 Barton from evangelical circles in the context of
19 history?

20 A David Barton?

21 Q Just for context, he's someone who is not
22 a trained historian who has been accused of cherry
23 picking quotes from the Founders to reach a
24 particular conclusion about the founding of the
25 country. I can see from your face you don't know

1 what I'm talking about. That's totally fine.

2 A I've never heard of David Barton that I
3 recall.

4 Q Let me ask this question: Apart from
5 that, what processes does a historian use to avoid
6 the mistake of just going through and cherry picking
7 out stories to support a narrative when you're
8 evaluating a historical practice or the adoption of
9 a policy?

10 A That's a very broad and really vague
11 question, it seems to me. You bring everything you
12 know about the way a political process operates or
13 the way in which social behavior operates in the
14 society you're examining, and you start by trying to
15 assemble all of the evidence you can about the
16 subject matter you're investigating.

17 There's no -- it's not something like a
18 statistical analysis where you can point to a
19 particular procedure that you're using to analyze
20 whether voting patterns are racially polarized or
21 whether there is a realignment or whether you have
22 social mobility in the society. It's not -- it's a
23 much broader gauge kind of analysis.

24 But I'm always struck by the language that
25 the courts have used in beginning with White versus

1 Regester, I think, and extending down to the present
2 day when the courts talk about analyzing the
3 totality of circumstances. That's what historians
4 do. That's what historians do when they're writing
5 history, not when they're involved in voting rights
6 cases.

7 And it's -- the same thing is true of
8 political scientists or sociologists when they're
9 analyzing questions such as those that we're talking
10 about here. It's not something only historians do.

11 I made a quote in -- a silly comment that
12 I made in that article or one of the articles that
13 historians are first among equals. That was a
14 little disciplinary chest beating, I suppose, but
15 historians do it a lot more than political
16 scientists or sociologists do, but some political
17 scientists and sociologists are very good
18 historians.

19 Q Very good.

20 If you can turn to page 118 for me.

21 A Yes.

22 Q At the top of that page you say: The
23 defendants' expert, on the other hand, had testified
24 that he was not an expert on voting rights, and at
25 the end of that paragraph you say that his opinion

1 was not entitled to the weight of a professional
2 opinion within the meaning of Rule 702 of the
3 Federal Rules of Evidence. That was your opinion,
4 not a finding the court made, correct?

5 A That's correct, although I should add it
6 probably started with my attorney co-author and not
7 with me, but I'm familiar with Rule 702.

8 Q Great. And later on that same page you
9 mention a county representative who was not a
10 credible witness. Again, this is the opinion of you
11 and your author, not something the court found,
12 correct?

13 A That's correct.

14 Q Let's move away from this case to page --
15 sorry, in the document away from the Edgefield case
16 to page 126?

17 A Yes.

18 Q All right. So on this page you're talking
19 about the legal standard in vote-dilution cases --
20 sorry. There we go. Sorry. Middle of the page
21 there: By trying to shift the court's attention to
22 the causes, rather than the degree, of racially
23 polarized voting, the defendants' expert sought to
24 reintroduce an intent standard.

25 Do you see that?

1 A Yes.

2 Q And so I'm assuming you're familiar with
3 the terms "vote dilution" and "vote denial."

4 A Yes.

5 Q And so how would you define vote dilution
6 in the context of a Section 2 case, just your -- I'm
7 not asking for your legal definition, just your
8 personal definition.

9 A Could you repeat the question?

10 Q Certainly. How would you personally
11 define the term "vote dilution" when used in a
12 Section 2 case?

13 A Well, the question -- first of all, a vote
14 dilution case is challenging a method of election,
15 such as an at-large election system or a districting
16 system that is being challenged as discriminatory in
17 effect because voting patterns are racially
18 polarized, and that means that the voting strength
19 of minority voters is diluted by the voting strength
20 of the majority group in a particular jurisdiction.
21 So that's really what the term means.

22 Q And those vote dilution cases would be
23 primarily redistricting or at-large election
24 systems; is that fair to say?

25 A Yes.

1 Q And then how would you personally define a
2 vote denial case under Section 2?

3 A Well, I usually refer to denial in
4 abridgment cases where the -- I mean, in cases
5 before 1965 there were instances in which vote
6 denial took place where it was simply impossible for
7 African-Americans in some jurisdictions to register
8 to vote because of the practices of a local
9 registrar, that's almost never the case nowadays.
10 But where the administration of elections makes it
11 more difficult for persons to vote and then the
12 burden of meeting the administrative requirements to
13 vote falls disproportionately on minority voters,
14 that would abridge their voting strength even though
15 their voting strength is not denied.

16 Q Thank you.

17 Let's move ahead to page 128. I'm almost
18 finished with this document here. On page 128 we're
19 reaching the conclusion of the paper, and the first
20 full paragraph begins: Critics charge that the
21 adversary system tempts witnesses to become
22 partisans of the cause for which they identify.
23 Some see liberals as especially guilty of serving
24 causes. Our experience is that witnesses are less
25 likely to fall prey to partisanship than to more

1 pedestrian vices, such as sloppiness, muddled
2 thinking or lack of attention to detail, and that
3 experts serving the defendants' side in these cases
4 are more likely to fall from professional grace than
5 are plaintiffs' experts.

6 Do you see that language?

7 MS. FINK: Just like to correct one of the
8 words. I think you read critics charge that the
9 adversary system tempts witnesses to become
10 partisans of the causes for which they identify, but
11 it should read, the cause for which they "testify."

12 MR. TYSON: Thank you. I'm sorry, I meant
13 to say "testify."

14 BY MR. TYSON:

15 Q So what do you mean by the statement that
16 those on the defendants' side of voting cases are
17 more likely to fall from professional grace than
18 plaintiffs' experts?

19 A Remember we're referring here in this
20 paragraph to allied experience, and what I mean to
21 say is that I have a lot of experience watching
22 experts for both parties in a lawsuit, and it is
23 still true that social scientists testifying for
24 defendants are more likely to engage in sloppy
25 scholarship than -- than are plaintiffs' experts,

1 though that's by no means always true. But that's
2 what we were saying there.

3 Q Have you ever seen a plaintiff expert
4 engage in what you would consider partisan behavior
5 in a voting case given that background?

6 A No, and I'm not sure I would say that I've
7 seen defendants' experts engaging in partisan
8 behavior, as we said in that paragraph. That's
9 not -- that's not the problem. The problem is the
10 quality of the evidence they bring to bear on the
11 issues they were asked to investigate.

12 Q So in the next sentence there you say: In
13 any event, the virtues that lawyers seek in expert
14 witnesses are the same as those valued by academics:
15 Knowledge of all the scholarship in their field of
16 research, hard work in the primary sources, and
17 honest, thoughtful analysis of all the evidence. If
18 after that the testimony is not likely to help the
19 lawyer's case, the expert will not appear on the
20 stand. The standards of the courtroom are as high
21 as those of academe.

22 Do you see that?

23 A Yes.

24 Q Is that statement your understanding today
25 of the standard for expert witness testimony in

1 federal court?

2 A Which part of that long quote?

3 Q The part at the end, standards of the
4 courtroom are as high as those of academe, is that
5 your understanding of the standard for expert
6 witness testimony in federal court?

7 MS. FINK: Objection, calls for a legal
8 conclusion.

9 A Yes.

10 BY MR. TYSON:

11 Q Okay. Is that your personal opinion of
12 what the standard for expert witness testimony would
13 be in this case?

14 A In this particular litigation or in the
15 paragraph you just asked me about?

16 Q Let's start with this litigation.

17 A Well, I haven't read the expert witness
18 reports of everyone in this case, and I certainly
19 haven't given them much attention in terms of -- in
20 all -- I haven't given all of them the kind of
21 attention I would need to have given if I were going
22 to make such a judgment. So you're asking me a
23 question about investigations I haven't made in this
24 case.

25 Q Let me ask about you specifically. I'm

1 sorry, yes. Let me ask about you specifically. Is
2 it your testimony that you believe your expert
3 report in this case is as -- the same as the
4 standard for a peer-reviewed journal article?

5 A Yes.

6 Q Okay. And you're aware, I'm assuming, of
7 the distinction between testifying and nontestifying
8 experts?

9 A Yes.

10 Q And so when you say in this quote that if
11 after that the testimony is not likely to help the
12 lawyer's case, the expert will not appear on the
13 stand, are you aware of disclosed testifying experts
14 who did not appear on the stand because their
15 testimony wasn't likely to help the lawyer's case?

16 A No, that's actually probably the jaundiced
17 view of my co-author, who is an attorney. But it's
18 also a common sense proposition. If the expert
19 reaches a conclusion that's contrary to the claims
20 made by the lawyer's client in the lawsuit, the
21 lawyer would not be inclined to put on testimony
22 that is adversarial to the interest of his client,
23 as I understand the practice.

24 Q Let me ask you about one more quote from
25 this. That last full paragraph: A vote dilution

1 lawsuit is an interdisciplinary enterprise in which
2 lawyers and academics learn from each other. These
3 cases also make available to scholars financial
4 resources rarely given for academic research. The
5 investigation often deals with issues ignored by
6 historians in the past, and the findings presented
7 in courtroom testimony serve to enrich our
8 understanding of the complex relationship between
9 race and politics in the South. In so doing,
10 historical research may exercise a direct influence
11 over events in the real world of the present.

12 You with me on that?

13 A Yes.

14 Q And so you're being paid for your work in
15 this case obviously, correct?

16 A Yes.

17 Q And is that payment giving you resources
18 to deal with issues ignored by historians in the
19 past?

20 A Let me try to answer your question in this
21 way: To travel and do research and to have time to
22 do research takes money. Historians and political
23 scientists and sociologists and so on can get grant
24 money to finance research.

25 The first time I ever testified in a case

1 I apparently felt embarrassed to discuss my expert
2 witness fee, and Judge Virgil Pittman in the
3 Southern District of Alabama said, you shouldn't be
4 embarrassed to admit that you're being paid for your
5 services. If you were working for free, I would
6 have to conclude that you were an advocate of a
7 cause, and so I stopped being embarrassed about the
8 fact that I'm paid a fee as an expert witness. I'm
9 also paid to teach. That doesn't mean that I am
10 teaching in a way that's corruptible by the fact
11 that I receive a salary for it.

12 And so the point is that these are not
13 issues which would normally be the subject of a
14 grant application. It would be difficult in some
15 cases to find foundations that would investigate a
16 particular locality, you know, and so the only way
17 these things could be done is by involvement as an
18 expert witness in a court case.

19 But the other part of what I'm talking
20 about in that paragraph is that -- is what I've also
21 referred to in this report, and that is that the
22 fact-finding in court cases is often providing new
23 empirical evidence about subject matter of great
24 interest to other social scientists, and that means
25 that the court decision itself and the documents

1 that were referenced in the court's decision from
2 expert witness reports to specific documents or
3 courtroom testimony is valuable evidence for
4 historians to use, and in writing about many
5 subjects, historians, political scientists, and
6 sociologists use evidence for court cases. That's
7 really the opinion we were addressing in that
8 paragraph.

9 Q Okay. What do you mean by the complex
10 relationship between race and politics in the South
11 in that sentence?

12 A Well, race -- racial concerns have been a
13 central part of the southern experience, and I
14 wouldn't restrict it to the South. That happens to
15 be the subject we were talking about there. But
16 it's certainly not always true that political
17 decisions are motivated by racial concerns, and it's
18 not always true that social behavior is motivated by
19 race.

20 It's a complex relationship, and you have
21 to investigate the complexities if you want to
22 understand whether there is or isn't a racial
23 dimension to political behavior.

24 Q Do you still believe the relationship
25 between race and politics in the South is complex?

1 A Yes.

2 Q And this article was written at a time
3 when there were white Democrats and black Democrats
4 and white Republicans, is it fair to say there was a
5 decent breakdown there like that?

6 A Are you talking about the 1980s now?

7 Q Yes, the time of this article I believe
8 was the 1980s.

9 A Yes.

10 Q At that time there was still a sizable
11 number of white voters who identified as Democrats;
12 is that right?

13 A Yes. I was actually thinking about the
14 question of whether African-Americans were divided
15 between Republican and Democratic Parties as they
16 used to be in 1940s, '50s, and early '60s, and by
17 the 1980s, most African-Americans had become -- had
18 become identified with the Democratic Party and
19 voted accordingly.

20 Q All right. We're finished with this
21 document. We have also been going for a little bit
22 over an hour and a half. Dr. McCrary, do you want
23 to take a break or keep going? I'm going to be
24 switching over to expert testimony and other things
25 now.

1 MS. FINK: Let's take a break.

2 THE WITNESS: I definitely would. I've
3 been drinking a lot of water.

4 (Recess 11:10-11:21 a.m.)

5 BY MR. TYSON:

6 Q Dr. McCrary, we're going to turn next to
7 your expert testimony, and so if you could go back
8 to your CV there for me.

9 A Okay.

10 Q And in reviewing the list of cases, it
11 appears to me that when you were not testifying for
12 the United States, you have always testified as an
13 expert for plaintiffs against jurisdictions, either
14 county or state; is that correct?

15 A Yes.

16 Q In cases where you served as a testifying
17 expert, have you ever concluded that a jurisdiction
18 was not engaged in discriminatory actions of some
19 sort?

20 A In cases in which I've testified, is that
21 your question?

22 Q Yes. Yes, sir, just the testifying expert
23 questions.

24 A No, as I observed earlier, if I reached
25 the opposite conclusion the lawyer would not have

1 wanted to use me in the case, and that has happened.

2 Q Have you ever been hired as an expert
3 witness by any conservative-leaning organization?

4 A Conservative-leaning organizations. Can
5 you be more specific?

6 Q Certainly. You're familiar with the term
7 "politically conservative," correct?

8 A Yes, although it has varied in its
9 definition over time.

10 Q Certainly. What is your definition of
11 politically conservative?

12 A You're asking about right now or 15 years
13 ago or 25 years ago?

14 Q Right now.

15 A That's very hard to pin down because
16 conservatives have changed their views so
17 dramatically in recent years, and it depends on
18 which particular conservatives you're talking about.
19 There are a lot of people who call themselves
20 political conservatives who are sharply critical of
21 the position taken by the Republican Party in recent
22 years, both in the Congress or state legislatures,
23 in the current President, and so forth. So a lot of
24 people who call themselves conservative disagree
25 with other people who call themselves conservative.

1 Q So is your answer then that you can't give
2 a definition what politically conservative means
3 despite recognizing that term?

4 A Yes.

5 Q Let's try it this way: Have you ever been
6 hired by a Republican Party or -- either state or
7 local or nationally?

8 A No, but I haven't been hired by a
9 political party.

10 Q Okay. Have you ever been hired by -- I'm
11 sorry, didn't mean to cut you off.

12 A No, you didn't cut me off.

13 Q Have you ever been hired by a Republican
14 Secretary of State in an election case?

15 A I've never been hired by a Secretary of
16 State.

17 Q You're familiar with the term "civil
18 rights organization," correct?

19 A Yes.

20 Q And how would you define a civil rights
21 organization?

22 A An organization that is created in order
23 to advance the interests of minority citizens to
24 protect their civil rights.

25 Q And you have been hired by civil rights

1 organizations, using your definition, as an expert
2 witness, correct?

3 A Yes.

4 Q In the list of cases where you provided
5 expert testimony, you mentioned Shelby County versus
6 Holder. Can you describe for me in your own words
7 what Shelby County was about?

8 A It was a challenge to the
9 constitutionality of the preclearance requirements
10 of the Voting Rights Act focusing specifically on
11 the coverage formula found in Section 4 of the Civil
12 Rights Act -- of the Voting Rights Act.

13 Q And you were retained as an expert witness
14 for the Department of Justice, correct?

15 A No. I was --

16 Q You were an expert witness --
17 (Simultaneous speaking.)

18 THE REPORTER: I didn't hear the answer.

19 THE WITNESS: I was employed by --

20 MR. TYSON: Sorry.

21 THE WITNESS: -- the Department of
22 Justice.

23 BY MR. TYSON:

24 Q And you testified as an expert witness on
25 behalf of the United States in that case, correct?

1 A In the sense that I filed a written
2 declaration in the case, yes.

3 Q And you were assisting in the defense of
4 the constitutionality of the coverage formula under
5 Section 4; is that correct?

6 A Yes.

7 Q Let's next go to document 10.

8 A Okay. Give me a moment.

9 Q Certainly. We'll mark this as Exhibit
10 Number 7.

11 (Defendant's Exhibit 7 was marked for
12 identification.)

13 A Yes, I have document 10.

14 BY MR. TYSON:

15 Q And is this testimony you provided to
16 Congress, specifically House Judiciary Subcommittee,
17 during its review of the Voting Rights Act after
18 Shelby County?

19 A Yes.

20 Q So I want to ask you a few questions about
21 that. About the middle of the page there you
22 indicate: In the view of the five conservative
23 justices in the majority, the coverage formula no
24 longer identified the parts of the country where
25 present-day racial discrimination affecting voters

1 are concentrated.

2 Is it your testimony that Shelby County
3 was a conservative decision?

4 A You mean the position of the majority
5 opinion in the -- yes.

6 Q And the bottom of page 1 right there in
7 the next sentence you note that Chief Justice
8 Roberts said much had changed about the South. Do
9 you see that language?

10 A Yes.

11 Q As a historian, do you disagree with the
12 chief justice's statement that much has changed in
13 the South between 1965 and Shelby County?

14 A No.

15 Q Turning to page 2 of your testimony, the
16 first full paragraph on that page you're discussing
17 vote denial cases and vote dilution cases. If you
18 want to take a minute to read that paragraph, I want
19 to ask about that.

20 A I'm sorry, which paragraph?

21 Q The paragraph that begins: The formula --

22 A Yes.

23 Q The first full paragraph: The formula
24 adopted in 1965.

25 A Thank you.

1 Yes, I've read the paragraph.

2 Q What I want to ask you about is the
3 statement in the middle of the paragraph that says:
4 Because the coverage formula was not altered by
5 using new data to identify jurisdictions where both
6 vote denial or abridgment and vote dilution were
7 sufficiently harmful to justify a preclearance
8 requirement, it appears, the majority in Shelby
9 County chose to ignore the extensive record of
10 discriminatory voting changes.

11 Can you explain to me what you were
12 arguing in that paragraph or that sentence about the
13 record that the court reviewed and how it ignored
14 it?

15 A The best way to answer that question will
16 take a few moments.

17 Q Okay.

18 A Because I go on in the testimony to
19 distinguish between the view of the majority and the
20 view of the dissenters, and to make the point that
21 the majority and the dissenters look at -- looked at
22 a -- took account of different parts of the record,
23 the dissenters focused on the evidence of continuing
24 discriminatory behavior in the jurisdictions that
25 were covered by the existing formula, and the

1 majority looked primarily at evidence that related
2 to the justification for the formula itself, and the
3 majority opinion ignores much of the record
4 assembled by the congress in 2005 and 2006 focusing
5 on evidence of voter participation, and the reason
6 for that was the fact that the formula itself is
7 based on evidence regarding political participation,
8 and so the majority opinion ignored a lot of
9 evidence that the dissenters thought was more
10 probative to the issues that were before the court.

11 Q Thank you.

12 On page 3 after the dissenters there, you
13 say: The decision in Shelby County removed a
14 uniquely powerful tool.

15 Is it fair to say that you believe
16 personally that preclearance should be reimposed?

17 A Yes.

18 Q And you personally believe that Georgia
19 should still be covered by the preclearance
20 requirements of the Voting Rights Act, correct?

21 A Yes.

22 Q Now, we can go far ahead in that document
23 to page 32. Okay. In the further full paragraph
24 that begins, "In the aftermath of Shelby County,"
25 you discuss the change to focus on barriers in the

1 path of in-person voting. Do you see that section
2 there?

3 A Yes. I apologize for the coughing. It's
4 a chronic cough. I'm not coming down with COVID-19.

5 Q That's good. I'm glad you're okay on that
6 front at least. That's totally fine. And we can
7 take a break at any point if you need to.

8 So you say in that paragraph that few
9 Section 2 cases have dealt with these types of
10 issues, and then you make the statement: Courts
11 lack a body of relevant precedents to guide them.

12 Do you still agree with that today?

13 A It is -- it is less true today because the
14 courts have resolved a way of reconciling the
15 fact-finding necessary in denial of abridgment cases
16 with the standards set down in the Supreme Court in
17 Thornburg versus Gingles, which was designed to deal
18 with voter dilution cases.

19 Q All right. We can put that away. Thank
20 you.

21 Are you familiar with the term "voter
22 suppression"?

23 A Yes.

24 Q And how would you define the term "voter
25 suppression"?

1 A Well, I generally don't use the term, but
2 what it refers to is barriers that make it more
3 difficult for citizens to vote, placing various
4 kinds of administrative burdens on their ability to
5 register and to vote.

6 Q And do you consider voter suppression to
7 be a partisan activity?

8 A Well, not necessarily.

9 Q When would voter suppression not be a
10 partisan activity?

11 A Well, either party could choose to
12 suppress voting strength. In general, that is -- in
13 general, there is a partisan pattern to the use of
14 laws that present burdens to the registration and
15 casting of ballots. That tends to be the work of
16 Republican Parties and state legislatures.

17 Q Let's move next to your work history at
18 the Department of Justice.

19 A Okay.

20 Q And so in your CV --

21 A Are you calling my attention to an
22 exhibit?

23 Q I am not. No. No. I was just -- I just
24 want to discuss generally.

25 A Okay.

1 Q I believe, from your CV, that you were
2 hired at DOJ in 1990; is that correct?

3 A Yes.

4 Q And do you recall who hired you in 1990?

5 A Who hired me? There's a complex personnel
6 operation that means that the decision is not made
7 by any one individual, and that's the best answer I
8 can give you.

9 Q And you were hired as part of the career
10 staff in the department, correct?

11 A Yes.

12 Q So you indicate in your CV you conducted
13 research for voting rights litigation. Did you have
14 any role in any of the Shaw line of cases?

15 A I had a role in those cases. They were,
16 of course, filed by private plaintiffs, and the
17 United States was a defendant.

18 And so I wasn't doing an investigation
19 before the case was filed, I was only doing research
20 in connection with the issues posed in that
21 particular litigation after it was filed.

22 I'm sorry, maybe I made too much of the
23 word "investigation." In the department we
24 distinguished between an investigation that takes
25 place before the filing of a case and work that is

1 done in a case after the case is filed.

2 Q And I appreciate you making that
3 distinction. One of my questions was -- you talked
4 about your expert witness role already. I'm
5 assuming you had a nonexpert witness role within the
6 department from a research standpoint. Is that --
7 is that a correct assumption on my part?

8 A When you say in nonexpert role, often my
9 job was characterized as an in-house expert, but if
10 you mean by that I was not retained as an expert by
11 the department, that's correct.

12 Q Well, and I guess maybe I need to
13 understand a little bit more of the inner workings
14 of the department. You referred to the
15 investigations before case is filed and the
16 investigation after a case is filed. Did you
17 participate in investigations before cases were
18 filed, or was your work with the department
19 exclusively investigations after a case was filed?

20 A Are you asking now about Shaw cases in
21 particular or cases in general?

22 Q I'm moving to all cases now just to
23 understand your role before we go back to Shaw.

24 A I routinely was involved in investigations
25 before a case was filed to help determine whether

1 the case should be filed.

2 Q Were you also involved in preclearance
3 review of state and local voting practices?

4 A Sometimes.

5 Q So were you involved in the preclearance
6 review that was part of the Georgia versus Ashcroft
7 2001 legislative district in Georgia?

8 A No.

9 Q Were you involved in the preclearance
10 review of the 19 -- early 1990s Georgia
11 congressional and legislative plans?

12 A Not that I recall.

13 Q I believe in your report you said you did
14 not participate in anything related to Georgia's
15 database matching preclearance process; is that
16 correct?

17 A I don't know whether I testified to that
18 effect, but that's true.

19 Q Were you involved in the preclearance
20 review --

21 A I'm sorry, could I -- I'm not sure I -- my
22 answer was directly related to the question you
23 asked. Can you rephrase -- can you tell me what you
24 asked so I make sure I'm consistent?

25 Q Certainly. I'll remove the reference to

1 your report that -- I was just explaining where I
2 got the information.

3 I'll ask it this way: Were you involved
4 in any review of Georgia's database matching
5 processes in the 2007 to 2009 range for preclearance
6 review?

7 A I'm glad I asked you for clarification. I
8 thought you were asking me about the photo
9 identification requirement that Georgia first
10 adopted. No, I was not.

11 Q And you anticipated my next question,
12 which was: Were you involved in the administrative
13 preclearance review of Georgia's photo
14 identification law?

15 A No.

16 Q Were you involved in the preclearance
17 review of Georgia's 2011 redistricting plans?

18 A As I recall a Georgia suit in a Section 5
19 declaratory judgment action before the -- of a
20 three-judge court in the District of Columbia, and
21 I -- therefore, my work would have been in the
22 context of that litigation.

23 Q So is that a yes, you did work on some
24 sort of preclearance review, or that you only -- is
25 your testimony that you worked on the lawsuit that

1 was filed concurrent with -- well, I won't
2 testify -- put words in your mouth on that.

3 Did you work on Georgia's -- preclearance
4 review of Georgia's redistricting plan either in
5 litigation or through an administrative process?

6 A Yes.

7 Q Did you participate in making a
8 recommendation about whether to preclear Georgia's
9 2011 redistricting plans?

10 A No, that wasn't -- making recommendations
11 of that sort wasn't my role in lawsuits, it was only
12 my role in administrative review where I was an
13 analyst, and I would actually make recommendation,
14 which was reviewed up the chain.

15 Q In your role as an analyst in an
16 administrative preclearance review -- so I'm
17 limiting to that subset of cases that you worked
18 on -- did you ever recommend that a Georgia voting
19 change be precleared?

20 A I'm trying to recall everything over 26
21 years. I did not often work on administrative
22 reviews. They usually only asked me to do -- to
23 take a hand in an administrative review when they
24 had a serious question about the purpose of the
25 change, so they tended to ask me about cases where a

1 decision to object would be more likely than the
2 ordinary run-of-the-mill administrative review.

3 Q Sitting here today, you can't -- I'm
4 sorry, go ahead.

5 A Go ahead with your question.

6 Q So sitting here today, you can't recall a
7 situation where you were part of an administrative
8 review for preclearance of a Georgia voting
9 practice, you were an analyst on that review, and
10 you recommended that the practice be precleared,
11 correct?

12 A That's correct.

13 Q For the same group when you were part of
14 an administrative preclearance review for a Georgia
15 voting practice, did you ever recommend that
16 preclearance be denied?

17 A Yes. I'm obligated not to discuss
18 particular internal decision-making in any one
19 instance, but I can answer that the answer is, yes,
20 I did sometimes participate in recommending an
21 objection.

22 Q Were there other historians who were
23 employed by the Department of Justice when you were
24 there?

25 A No.

1 Q Was there a historian who was employed --
2 sorry.

3 A Let me correct. Were you asking
4 specifically about the voting section, which is what
5 I understood you to be asking about? You actually
6 said the department, and it's a different answer.

7 Q Thank you for that clarification. Yes,
8 when I'm referring to the Department of Justice in
9 this, I am limiting it to the voting section, so I
10 will be precise about that.

11 A Because there are historians who work in
12 other parts of the Department of Justice.

13 Q Certainly. Certainly.
14 Did the Department of Justice's voting
15 section employ a historian before you were hired?

16 A No.

17 Q Do you know if the voting section hired
18 an -- a new historian after you retired?

19 A I do not know.

20 Q Is it correct that the Section 2 cases you
21 worked on in the voting section were all what we
22 would call vote dilution cases?

23 A No.

24 Q So you did work on some vote denial and
25 abridgment cases as you categorized them earlier?

1 A Yes.

2 Q And do you recall which cases -- well, I
3 guess -- let me reask that. Is the fact that you
4 worked on a particular case if you were not a
5 disclosed expert also something that you are bound
6 to a confidentiality agreement regarding with the
7 voting section?

8 A No, I just can't discuss the internal
9 decision-making process.

10 Q Okay. So do you recall what vote denial
11 or abridgment cases you worked on during your time
12 at the voting section?

13 A And your question specifically is about
14 Section 2 cases, right?

15 Q Correct.

16 A The challenge to a 2013 statute adopted by
17 North Carolina, which was challenged in United
18 States versus McCrory and challenge to -- Section 2
19 challenge to the photo identification requirement in
20 Texas.

21 In other cases which were Section 5 cases
22 brought by jurisdictions, I also worked on denial or
23 abridgment matters.

24 Q Is it correct to say that the cases --
25 Section 2 vote denial or abridgment cases that you

1 worked on was after Shelby County was decided?

2 This isn't a memory test. I didn't know
3 if there was a specific delineator for you or not,
4 and if there's not, that's fine.

5 A Well, the complication is that I worked on
6 the Texas photo ID case when it was before the DC
7 court before Shelby County, and in the South
8 Carolina Section 5 case before Shelby County was
9 decided, and I worked on a Florida case before
10 Shelby County was decided, again a Section 5
11 context. And because we were -- because the United
12 States was involved in the Texas photo ID case in
13 DC, we were not involved in the Section 2 case down
14 in Texas until after Shelby County was decided.

15 Q Thank you for that clarification.

16 You mentioned that one of your roles was
17 identifying consultants and expert witnesses to be
18 used in cases; is that correct?

19 A Yes. I just remembered another context
20 that I had forgotten to mention in connection with
21 denial or abridgment cases, and that is a case
22 involving a claim in Noxubee County, Mississippi, US
23 versus Ike Brown, which was also a denial or
24 abridgment case well before Shelby County was
25 decided.

1 Q Thank you.

2 A And I'm trying to remember whether I was
3 involved in any others, but that's enough. That's
4 as much as I can recall.

5 Q Thank you.

6 So you mentioned that one of your roles
7 was assisting in identifying consultants and expert
8 witnesses for the voting section to use in cases; is
9 that correct?

10 A Yes.

11 Q And so you hired political science
12 experts, I'm assuming?

13 A Oh, yes. More political scientists than
14 anyone else. More political scientists than anyone
15 else. Than any other discipline.

16 Q And did you -- I'm sorry, yes.

17 And did you ever look at hiring Dr. Tom
18 Brunell during your time at the Department of
19 Justice?

20 A I met Tom Brunell at, I think, an American
21 Political Science Association meeting where he was
22 with his dissertation advisor, Bernie Grofman, who
23 was an old friend of mine and an expert I had worked
24 with in cases. I don't remember whether we ever
25 considered using Tom Brunell in a case or not.

1 Q So while you were employed at the voting
2 section, were you ever placed on a remedial plan as
3 a result of any workplace discipline?

4 A I beg your pardon?

5 Q While you were employed at the department,
6 were you ever placed on a remedial plan as a result
7 of a workplace disciplinary process?

8 A I don't even know what a remedial plan is
9 in the Department of Justice, but I was never -- my
10 objectivity or behavior was never questioned in any
11 regard.

12 Q While you were employed at DOJ, were you
13 ever disciplined for refusing to work on a case
14 because of the racial makeup of the alleged victims?

15 A No.

16 Q While you were employed at DOJ, were you
17 ever formally reprimanded by your supervisors for
18 refusing to work on a case because of the racial
19 makeup of the alleged victims?

20 A No.

21 Q Were you ever informally reprimanded by
22 your supervisors for refusing to work on a case
23 because of the racial makeup of the alleged victims?

24 A No.

25 Q I'd like to talk about two particular

1 cases that you worked on while you were at the
2 Department of Justice. First, you mentioned a few
3 minutes ago the Noxubee County case, the Ike Brown
4 case.

5 A Yes.

6 Q You're familiar with that case?

7 A Yes.

8 Q Could you briefly describe what that case
9 involves?

10 A Yes, it involved claims that the
11 Democratic Party leadership in that county, which
12 was, as I recall, an African-American majority
13 county and the party leadership, the executive
14 committee and so on was controlled by
15 African-Americans, and there were claims that they
16 interfered with the opportunity of the white
17 minority in the county to -- I forget whether it
18 involved registration. It mostly involved voting as
19 I recall. And so that was the basic factual
20 situation in the case.

21 Q Now, did you initially refuse to work on
22 that case because of your personal opposition to the
23 department bringing it?

24 A No.

25 Q Were you personally opposed to that case

1 because it was being brought to protect white voters
2 from African-Americans who were being accused of
3 violating the Voting Rights Act?

4 A No. At that time I did have questions in
5 my mind as to whether that was consistent with the
6 mission of the civil rights division, but I -- I saw
7 a memo by a former colleague, David Marblestone,
8 which he had been tasked with years earlier where he
9 established through his research into the
10 congressional -- the record before Congress and the
11 courts that such claims were legitimate, but that's
12 the only sense in which I had questions about it.

13 I had questions also about the legal
14 argument that was being used in the case initially
15 as to whether it was appropriate to characterize the
16 behavior described as vote dilution, which it seemed
17 to me was clearly a denial or abridgment kind of
18 claim, but I did not refuse to work on the case.

19 In fact, I helped identify the appropriate
20 expert witness to use in the case, Theodore
21 Arrington, whom we had used in the past. I worked
22 with the attorneys and with Professor Arrington in
23 the course of his investigation, I went to -- and
24 helped prepare him for his deposition as I recall,
25 and I certainly went to Jackson to help prepare him

1 at trial.

2 Q Were your questions about the mission of
3 the voting section related to the racial makeup of
4 the alleged victims in the Noxubee County case?

5 A Yes, I couldn't think of any other case of
6 that sort that had been brought in the -- in the
7 history of the civil rights division's
8 implementation of the Voting Rights Act since 1965,
9 and it did seem to me an unusual case, but once I
10 saw the facts in the case, I became convinced that
11 it was a meritorious case.

12 Q And were your questions about the mission
13 because you believed the mission of the voting
14 section was to protect people of color as opposed to
15 white voters?

16 A It was because the mission was to protect
17 the interests of minority voters, and I didn't at
18 first realize that African-Americans were in the
19 majority in that county and that whites were
20 necessarily in the minority. That changed the
21 complexion of the case, no pun intended.

22 Q Now, who was Christopher Coates at the
23 time of the Ike Brown case?

24 A He was an attorney in the voting section.
25 He had -- he had not -- I think at that point he had

1 not become the deputy chief, but I may be
2 misremembering the chronology of his promotion, and
3 it was before he was section chief.

4 Chris is a person I had known since 1980.
5 I had worked on several cases for him in the 1980s
6 as an expert witness, a testifying expert. I had,
7 in fact, recruited him to come to the voting section
8 in the 1990s when his daughter graduated from high
9 school, and he was -- he was interested in leaving
10 private practice in Milledgeville.

11 So I had worked with him regularly on
12 cases after he came to the voting section, including
13 cases in Montana, which we investigated together
14 initially. So I've known Chris for many years.

15 Q Are you aware that Mr. Coates testified to
16 the US Commission on Civil Rights in 2010 about the
17 Ike Brown case?

18 A Yes.

19 Q If you could turn to document 11 with me
20 here.

21 A There's nothing in the folder. I think
22 this must have been the document that was not in a
23 folder which I accidentally saw when I removed
24 the -- you want me to get that document?

25 Q Yes, please. It's a transcript of

1 testimony to the US Commission on Civil Rights.

2 A Yes, I've got it.

3 Q We will mark that as Exhibit 8.

4 (Defendant's Exhibit 8 was marked for
5 identification.)

6 BY MR. TYSON:

7 Q If you could turn to page 16 of that
8 testimony?

9 A Okay.

10 Q On page 16 -- hold on. Let me get there
11 too, sorry. Do you see the first full paragraph
12 says: One of the social scientists who worked in
13 the voting section and whose responsibility it was
14 to do past and present research into a local
15 jurisdiction's history flatly refused to participate
16 in the investigation.

17 Do you see that statement?

18 A Yes.

19 Q And are you familiar with this statement
20 by Mr. Coates to the US Commission on Civil Rights?

21 A Yes.

22 Q And do you know the social scientist to
23 whom Mr. Coates is referring?

24 A Yes, he was referring to me.

25 Q And though you ultimately testified at the

1 trial, I believe you -- what you've explained here
2 is you did initially not participate in the case; is
3 that correct?

4 A No, that's not correct. I will preface my
5 answer by saying that the testimony you just read is
6 false, and I addressed this in the investigation by
7 the Inspector General's office in the Department of
8 Justice, and the inaccuracy of that is addressed in
9 the Inspector General's report.

10 My recollection, which could be wrong, is
11 that there is a footnote 28 in the Inspector
12 General's report that refers to this and points out,
13 which I had quite forgotten, that Chris Coates --
14 and I hadn't seen the document, the evaluation
15 document to which the Inspector General investigator
16 was referring, but that he had rated my performance
17 on that case outstanding.

18 Q Going back a page to page 15 at line 18.

19 A Okay.

20 Q The statement: Once the full
21 investigation into Brown's practices commenced,
22 opposition to it by career personnel in the voting
23 section was widespread.

24 Were you aware of any opposition to the
25 Brown case within the voting section?

1 A I was aware of some individuals who
2 didn't -- in the white case, including, actually,
3 the paralegal who went to Mississippi when I was
4 unavailable to go and do the newspaper research.

5 Q So it's your testimony that you were
6 not -- I'm sorry?

7 A I also remember a number of attorneys who
8 said this was a meritorious case, so there were a
9 lot of different views.

10 Q And it's your testimony that you were not
11 part of resistance or opposition to the case within
12 the voting section; is that correct?

13 A That's correct, and I so offered sworn
14 testimony twice.

15 Q Are you familiar with the book Injustice:
16 Exposing the Racial Agenda of the Obama Justice
17 Department by J. Adams?

18 A No.

19 Q Let's go to document 12. Hang on to the
20 civil rights testimony because we will come back to
21 that. Document 12 we'll mark as Exhibit 9.

22 (Defendant's Exhibit 9 was marked for
23 identification.)

24 A I actually do remember now seeing this
25 online when it was published. I had forgotten about

1 it.

2 BY MR. TYSON:

3 Q Okay. Have you ever read this book
4 before?

5 A No.

6 Q I want to ask you about two sections, two
7 excerpts from it. The first excerpt is the second
8 physical page, pages 50 and 51. And I believe you
9 actually answered my first question. At the bottom
10 of page 50 and top of page 51, if you can read the
11 paragraph that kind of overlaps those two.

12 A I've read the paragraph.

13 Q The first statement I wanted to ask you
14 about, Mr. Adams's book says: Coates could not find
15 anyone in the section to work with him.

16 Is that your recollection of what happened
17 with this case or is Mr. Adams incorrect?

18 A I think Mr. Adams is incorrect.

19 Q Mr. Adams at the end of that page says
20 that Joann Sazama went to do the newspaper reviews
21 in Noxubee County. Do you recall that?

22 A I do.

23 Q And Ms. Sazama was a paralegal, not a
24 historian, correct?

25 A That's correct.

1 Q Is the local newspaper review a role you
2 undertook in every other Section 2 case in which you
3 participated directly?

4 A In most, yes, but we also used paralegals
5 in doing research, and from time to time we would
6 engage graduate students at some university nearby
7 when we had retained an expert to do research for
8 the -- for the expert as well.

9 Q Okay.

10 A In other words, you don't have to have a
11 PhD in history to do newspaper research.

12 Q So on page 51 at the top of that first
13 full paragraph when Mr. Adams says that Ms. Sazama
14 ended up having to do the job of the DOJ's in-house
15 historian, it's your testimony that that is not a
16 correct statement because other people would do that
17 job as well of local newspaper review?

18 A I'm not sure I understand your question in
19 the context of this paragraph.

20 Q Okay.

21 A It is true that Joann went to Mississippi
22 to do research on the case, and I was busy at the
23 time doing -- working on other matters, as I told
24 the Inspector General's investigator, and, in
25 particular, I was using my nights and weekends to

1 work on the Law Review article that ended up being
2 published at the end of preclearance, and I was
3 reluctant -- and it was also not long after I had
4 emergency quadruple bypass surgery, so I was trying
5 to take it a little easy at that point.

6 But in that sense the way that Christian
7 puts it, it's like I wasn't doing my duty, but --
8 and I see that in the same paragraph, Christian goes
9 on to quote Chris Coates's false testimony before
10 the Civil Rights Commission that I flatly refused to
11 work on the Ike Brown investigation. That's just
12 not true.

13 In fact, I remember a conversation with
14 Chris Coates in which he came asking me about
15 working on the case, and I told him I have never
16 flatly refused to work on a case. And I said, I'm
17 tied up with other matters right now, but I
18 directly -- actually, he's probably quoting me when
19 he says that in his testimony before the Civil
20 Rights Commission, but it's just not true.

21 Actually, Christian says later on in that
22 paragraph that I did travel to Noxubee County later
23 in the case.

24 Q So you're referring to the author as
25 Christian. I'm assuming you know Mr. Adams

1 personally.

2 A Yes, we worked on one case together
3 probably -- actually, two cases together, and so I
4 knew him well. And, in fact, at that time he
5 attended the Catholic church next door to the
6 Presbyterian church that my wife and I attend, so I
7 sometimes saw him on Sunday morning. But, yes, I
8 know him well.

9 He's also false in saying that -- well, I
10 take that back. He says: Coates viewed McCrary's
11 lack of cooperation was a kind of insubordination.
12 Chris never said that to me nor to anyone else, to
13 my knowledge, who may have said it to Christian, but
14 I -- I reject that charge.

15 Q Let's turn to the next page, which is page
16 52 there, and let's look at the first full
17 paragraph. Mr. Adams says: But with his
18 involvement in the Ike Brown case, suddenly none of
19 that mattered anymore. Many voting section
20 attorneys stopped talking to Coates. He had met
21 Peyton McCrary for lunch at least once for many
22 years, but that tradition quickly ended.

23 Is that a correct statement, first that
24 you met for lunch once a week for many years?

25 A That's true.

1 Q Did that end after -- I'm sorry.

2 A Half of that claim is false.

3 Q So the statement that the -- that
4 opportunities or the tradition of you having lunch
5 with Mr. Coates ended after the Noxubee County case
6 is false?

7 A That's true. I don't know how Christian
8 would have known what the pattern was since he
9 wasn't involved in going to lunch.

10 Q Have you spoken to Mr. Coates following
11 his testimony to the US Commission on Civil Rights?

12 A I'm sure I have because -- well, actually,
13 I should look at the date. Yes, that was in 2010,
14 and subsequent to that I had occasion to talk with
15 Chris on several -- several times when he was
16 representing South Carolina after he retired from
17 the department in the case involving the
18 preclearance of South Carolina's photo
19 identification requirement.

20 In fact, he had borrowed a copy of my book
21 and returned it to me during the proceedings in that
22 case, and, of course, we had conversations in
23 connection with a deposition that we both attended.

24 Q Did you ever talk to Mr. Coates about what
25 you said are his lies to the US Commission on Civil

1 Rights?

2 A No, I didn't see any point in rubbing his
3 nose in it. I try not to pick fights.

4 Q So let's -- we'll come back to that
5 Exhibit 9 in just a minute. Let's go back to
6 Exhibit 8, the testimony to the US Commission on
7 Civil Rights.

8 A I have that as document 11.

9 Q I'm sorry. It's document 11 for you, and
10 Exhibit 8 to the deposition. I'll refer to it by
11 document number. If you can flip with me to pages
12 83 and 84.

13 A Okay.

14 Q I want to ask you about the last paragraph
15 on 83 going into 84. Mr. Coates says: And I had
16 trial attorneys that I had worked with in cases that
17 were successful and we had good relationships with.
18 And they told me, one -- the person that testified
19 told me point blank that he didn't come to the
20 voting section to sue black people, to sue
21 African-American people.

22 Do you see that statement?

23 A I do.

24 Q Did you ever hear comments like that from
25 the attorneys in the voting section when you were

1 there?

2 A No.

3 Q Do you share that view of you didn't come
4 to the voting section to sue African-American
5 individuals?

6 A No.

7 Q Let's go next to page 18 of the testimony.

8 A Okay.

9 Q In the middle paragraph of that page
10 there's a reference to Mark Kappelhoff, the chief of
11 the division's criminal section. Do you see that?

12 A Yes.

13 Q And do you know Mr. Kappelhoff?

14 A I do not.

15 Q And at the bottom of page 18 over into
16 page 19 there's a statement that: The primary role
17 of the civil rights division is to enforce the civil
18 rights laws enacted by Congress -- I'm sorry, I'm
19 reading the wrong section. My apologies.

20 Are you aware of any civil rights groups
21 that complained to members of the voting section
22 about the Ike Brown case?

23 A No.

24 Q And on page 19 there's a statement about
25 civil rights groups where Mr. Coates says beginning

1 with "Instead" at line 6: Instead, many of these
2 groups act, as they did in response to the Brown
3 case, not as civil rights groups but as special
4 interest lobbies for racial and ethnic minorities
5 and demand not equal treatment but enforcement of
6 the Voting Rights Act for only racial and language
7 minorities.

8 Do you see that language?

9 A Yes.

10 Q Do you agree with that description of
11 civil rights groups that Mr. Coates is giving?

12 A No.

13 Q And the Ike Brown case was ultimately a
14 successful outcome for the division, correct?

15 A That's correct.

16 Q Okay. Let's move next to the New Black
17 Panthers Party case. Are you familiar with that
18 case?

19 A Yes.

20 Q And what were the issues in that case?

21 A As best I recall it involved a lawsuit
22 about two individuals who were members of an obscure
23 group called the New Black Panther Party, who were
24 apparently trying to intimidate voters at a polling
25 place in Philadelphia. And my recollection is that

1 this was a polling place or in a precinct with a
2 substantial African-American population, whether
3 majority or just a large minority I don't recall,
4 but one of the two had a policeman's nightstick and
5 was beating -- hitting the palm of his hand with it
6 as presumably a method of intimidating people who
7 were going in to vote.

8 And as I say it involved two people in one
9 polling place, not the kind of thing that you
10 ordinarily bring a lawsuit about. When you're on
11 election coverage, we try to deal with that
12 situation informally with people that are involved
13 in the administration of election in the
14 jurisdiction, but it's -- it's hardly the kind of
15 thing that I had ever seen a case brought, but I'm
16 generally familiar with it.

17 Q And the victims or the alleged victims in
18 that case that the individuals were attempting to
19 intimidate -- well, say it this way: Were the
20 individuals in that case attempting to intimidate
21 white voters?

22 A Well, I think that was the claim that the
23 department had in the case. I don't know that to be
24 true.

25 Q Okay. Now, you worked on the New Black

1 Panther case with Mr. Adams, correct?

2 A Well, I worked on it in a limited
3 capacity. The only thing they asked me to do was to
4 identify possible expert witnesses, and it was --
5 they were looking for someone who was basically
6 experienced in law enforcement as I recall. And I
7 looked, but I don't think we came upon any logical
8 choices, and they more or less dropped the idea, and
9 eventually the case went away.

10 Q If you could go back to document 12, which
11 is Exhibit 9, the last page of Mr. Adams's book.

12 A Page 180? I'm sorry. Yes, 180.

13 Q The page number in the book is 130. It's
14 the last physical page of document 12, Exhibit 9.

15 A Okay. The number is hard for me to read.
16 130, okay.

17 Q And so Mr. Adams begins at the top of that
18 page: Similar to the Ike Brown case, DOJ lawyers
19 working on the Panther case ran into institutional
20 resistance within the DOJ from the very beginning,
21 including from the historian who had hobbled the
22 Brown case, Peyton McCrary.

23 Did you launch institutional resistance to
24 the Black Panther case?

25 A No. I also didn't hobble --

1 Q Mr. Adams is --

2 A I also didn't hobble --

3 Q I'm sorry?

4 A -- the Brown case. That sentence has two
5 false statements with it.

6 Q And the next sentence indicates that you
7 were tasked with looking for an expert to explain
8 the history of voter intimidation tactics and the
9 intimidating nature of the Panther organization.
10 That's a slightly different description of expert in
11 law enforcement that you gave. Is this description
12 of what you were tasked to do correct?

13 A No.

14 Q Another two sentences later, Mr. Adams
15 says: Mr. McCrary tried to scuttle our
16 recommendation, claiming the expert wasn't competent
17 to testify about the organization.

18 Is that a correct statement?

19 A No, I had no -- I have no recollection I
20 had any such involvement, and I simply don't know
21 who the heck he was talking about there. I don't
22 know what potential expert he was talking about, but
23 I didn't evaluate anybody. I looked unsuccessfully
24 for somebody to work on the case, but it was a much
25 more limited role.

1 I don't remember Christian or Chris asking
2 me to identify someone who -- what was his -- to
3 explain the history of voter intimidation tactics
4 and the intimidating nature of the Panther
5 organization.

6 If he means the Black Panthers in the
7 1960s by reference to the Panther organization, I'm
8 absolutely confident that that issue never came up.
9 If he's talking about the New Black Panther Party, I
10 don't know anyone who would know anything about the
11 history of the New Black Panther organization, so it
12 just sounds increasingly farfetched. Bears no
13 relationship to the memory I have of anything having
14 to do with that case that involved me.

15 Q And at the end of that paragraph, Mr.
16 Adams says: McCrary's obstructionism damaged the
17 case.

18 I'm assuming you disagree with that as
19 well.

20 A Of course.

21 Q Then at the bottom of the page, Mr. Adams
22 talks about the advent of -- last full paragraph,
23 the advent of the Obama administration. Do you see
24 that?

25 A You said the last full paragraph?

1 Q Last full paragraph on that page starts
2 with, "The problem extended far beyond McCrary."

3 A Yes.

4 Q If you want to read that paragraph, I just
5 have one question about that.

6 A Okay.

7 Q So was it your experience that the
8 election of President Obama made resistance to the
9 New Black Panther Party case go to the top of the
10 civil rights division, as Mr. Adams says in that
11 paragraph?

12 A No, not to my knowledge.

13 Q We can put that exhibit away, and I have
14 couple more questions about Mr. Coates's testimony.

15 A Okay.

16 Q So if you could turn first to page 21 of
17 Mr. Coates's testimony.

18 A Okay.

19 Q And the first full paragraph on that page
20 starting at line 5: The election of President Obama
21 brought to positions of influence and power within
22 the civil rights division many of the very people
23 who had demonstrated hostility to the concept of
24 equal enforcement of the Voting Rights Act.

25 Do you agree with that statement?

1 A No.

2 Q Did the election of President Obama change
3 the focus of the voting section's work?

4 A Yes, in the sense that the relative
5 indifference to bringing affirmative Section 2 cases
6 in the George W. Bush administration was replaced by
7 a return to a wish to enforce actively the Voting
8 Rights Act.

9 Q If you can go next to page 34.

10 A Okay.

11 Q Line 14 of page 34 Mr. Coates testified:
12 During the Bush administration, the voting section
13 began filing cases under the list maintenance
14 provision of Section 8 to compel state and local
15 registration officials to remove ineligible from
16 the list.

17 Were you involved in any Section 8 NVRA
18 list maintenance cases in the voting section?

19 A I had a very limited involvement as I
20 recall. I'm trying to remember what it would have
21 been, but it was probably more than a casual
22 involvement. It may have been -- may have involved
23 asking about potential experts, but I wasn't
24 actively involved in any of them. And, actually,
25 they were largely not expert-related cases, as I

1 recall.

2 Q And beginning on line 21 of page 34,
3 Mr. Coates said: When Ms. Fernandes told the voting
4 section that the Obama administration was not
5 interested in the Section 8 list maintenance
6 enforcement activity, everyone in the room
7 understood exactly what she meant.

8 Were you ever present at a meeting with
9 Ms. Fernandes where this Section 8 list maintenance
10 was discussed?

11 A Yes. Excuse me, I've got spam coming in.
12 I'll have to cut it off.

13 Now, can you -- you were asking about the
14 meeting in which Julie Fernandes is quoted by Chris
15 Coates as saying that the Obama administration was
16 not interested in Section 8 list maintenance
17 enforcement activity. I do remember it, though I
18 don't remember those exact words. But I also think
19 that I know what Julie meant, which was --

20 Q And what do you -- I'm sorry.

21 A -- which was --

22 Q You anticipated my question.

23 A -- which was that this -- this was a
24 matter that, A, was not a problem, and, B, that it
25 was something that didn't -- it wasn't -- it wasn't

1 consistent with what the civil rights division had
2 always done in regard to -- in regard to enforcing
3 the Voting Rights Act.

4 And furthermore, the problem of list
5 maintenance as -- as the -- as the lawyers who were
6 bringing -- advocated bringing such cases was that
7 they looked at the census data on the voting age
8 population, and they looked at the voter
9 registration lists, and they saw that sometimes
10 there were more persons listed as registered voters
11 than there were in the voting age population of the
12 jurisdiction.

13 And that's actually an artifact of the
14 fact that there was widespread failure to purge
15 voter registration lists, particularly in the
16 Mississippi counties that Christian Adams's
17 organization and Chris Coates were involved in after
18 leaving the voting section.

19 But they were simply not meritorious
20 cases. And, in fact, the department was
21 unsuccessful in getting the federal courts to take
22 its view of those list maintenance cases.

23 Q Based on your experience within the
24 department, did partisan politics drive the
25 enforcement divisions of the voting section at any

1 time when you were there?

2 A Yes, during the George W. Bush
3 administration.

4 Q And so you don't believe that politics
5 were driving the enforcement decisions during the
6 Obama administration at all, only during the Bush
7 administration?

8 A That's correct. And to underscore my
9 emphasis on the George W. Bush administration, that
10 had also been true -- not been true in any
11 administration before that. Even in the years when
12 W. Bradford Reynolds was head of the division and
13 was perceived as hostile to voting rights, he
14 actually was engaging in a lot of active enforcement
15 of Voting Rights Act in ways that were responsible,
16 and under George H.W. Bush, that continued to be
17 true.

18 So it's -- the only time I've ever seen
19 partisan decision-making in the voting section of
20 the civil rights division was during a portion of
21 the George W. Bush administration when they were
22 literally hiring from the Republican Trial Lawyers
23 Association. And there's ample discussion of this
24 in an Inspector General's report which faults the
25 persons who were actively running the civil rights

1 division during a portion of that time, Brad
2 Schlozman and Hans von Spakovsky.

3 Q And do you know Mr. von Spakovsky?

4 A Yes.

5 Q And did you ever have any interactions
6 with Mr. von Spakovsky?

7 A Yes.

8 Q Did you ever refer to Mr. von Spakovsky as
9 a Nazi?

10 A No. He claims that I did based on
11 something he was doing, but I did not.

12 Q While you were employed in the voting
13 section, was some information that you handled
14 confidential?

15 A I'm sorry, what was the question?

16 Q While you were employed with the voting
17 section, was some of the information that you had
18 in, for example, preclearance review files,
19 considered to be confidential by the department?

20 A Oh, yes.

21 Q And how did you determine what was
22 confidential information and what was not in the
23 department?

24 A There were guidelines explaining exactly
25 what categories fit into confidential and not. I

1 mean, internal deliberations of any kind and the
2 work of analysts and attorney -- well, work of
3 analysts working on a Section 5 review, the work of
4 attorneys in an investigation, all of that was
5 confidential in the sense that it was an internal
6 deliberation or an internal practice.

7 Q While you were employed at the voting
8 section, did you ever provide confidential
9 information to a nongovernment entity that was not
10 entitled to have it?

11 A No.

12 Q Did you ever -- while you were at the
13 voting section, did you ever provide confidential
14 information that your superiors did not authorize
15 you to provide to an outside person or organization?

16 A No.

17 Q Did you ever provide information your
18 superiors didn't authorize you to provide to Gerry
19 Hebert?

20 A No.

21 Q Joe Rich?

22 A No.

23 Q Or Bill Yeomans?

24 A No.

25 Q Now, aside from your work at the

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1 Department of Justice and your work as a professor,
2 have you had any other employment in the last 20
3 years or so?

4 A You want to repeat your question because I
5 was mulling over, and I'm not sure I followed
6 exactly what you're asking.

7 Q I just was asking a more general question.
8 In the last 20 years, looking at your CV, aside from
9 your work as a professor and at the Department of
10 Justice, did you have any other employment during
11 that time?

12 A No.

13 Q Did you work anywhere else is all I'm
14 asking.

15 A Not during the last 20 years. In 1999, I
16 did take leave from the government to teach at
17 Swarthmore College as the Eugene Lang Professor, but
18 that wasn't within the last 20 years.

19 Q Thank you.

20 Let's go off the record real quick.

21 A Okay.

22 (Recess 12:34-1:23 p.m.)

23 BY MR. TYSON:

24 Q Hope everybody had a good lunch.

25 Dr. McCrary, we're now going to move to our -- to

1 your report itself. So if you could get that in
2 front of you. I believe we marked it as Exhibit 3,
3 but it's document 2 for you.

4 First of all, did you write this report
5 all yourself, or did you -- I know you had
6 assistance on the research side, but did you have
7 assistance on the writing side?

8 A Nobody writes my reports for me, period.

9 Q And did you send plaintiff's counsel
10 drafts of your report before it was finished?

11 A Yes, I sent two or three partial drafts,
12 as I recall.

13 Q And did plaintiff's counsel provide you
14 with any suggested edits that led to change -- led
15 you to change your opinions at all?

16 A No.

17 Q So one issue that I know we kind of talked
18 a little bit about already, but I know your report
19 as a historian is a little different than maybe a
20 statistical report or something else in terms of
21 what you relied on to formulate your opinions. I
22 know you've talked about kind of the research
23 process that you went through and all of that. Is
24 it correct that any document that you relied on to
25 form your opinion is cited in the footnotes of your

1 report?

2 A It depends on what you mean by relied on.
3 I looked at a lot of things that affected my
4 selection of what I thought was relevant to discuss.
5 I've got well over a file cabinet full of documents
6 from this case, so I didn't -- even though I have
7 over 300 footnotes, I didn't cite everything that I
8 looked at that had a remote relationship to my
9 conclusions in this case.

10 Q And I understand that and appreciate that.
11 Given that, can you describe maybe general
12 categories of documents that you reviewed in the
13 preparation of your report?

14 A You mean that I did not cite?

15 Q Correct, yeah, documents, I'm sorry -- let
16 me ask that again. So given that there are some
17 documents you reviewed and relied on in preparation
18 of your report that are not cited, could you give me
19 the categories of documents that you reviewed that
20 are not referenced in the footnotes?

21 A Sure. I examined all of the Section 5
22 submissions that were supplied through discovery. I
23 didn't cite very many of them, but they help me in
24 identifying the work of the Secretary of State's
25 Office, and, of course, many of them turned out not

1 to be very revealing, but it was useful to read
2 through those documents even though I didn't cite
3 them. That would be one category.

4 I did a lot of newspaper research, and I
5 cited very few newspaper articles in the report on
6 that, so that was another category -- big category
7 of documents that I reviewed that I did not end up
8 citing.

9 There are other categories if I think
10 about it for a moment if you want me to pursue that
11 line of meditation.

12 Q That's helpful. Maybe what I can do is
13 narrow that a little bit. Did you review the
14 legislation as to House Bill 316 in the 2019 session
15 of the General Assembly?

16 A I did not. I mean, I looked at the
17 statute in general, I looked at news coverage of its
18 adoption, but I did not make an analysis of it, and,
19 therefore, I didn't discuss it in the report.

20 Q Are there any expert reports from other
21 cases that you reviewed that are not cited in the
22 footnotes?

23 A I'm sure there are because I looked at a
24 lot of expert reports. I don't remember. If they
25 were particularly relevant, I certainly cited them.

1 Q Okay. So this gets me back a little bit
2 to something we talked a little bit more earlier,
3 but is there a particular method that you use, based
4 on your training and experience, to determine what
5 is relevant to review and include in your report?

6 A Well, there's no method to determine
7 what's relevant. It depends on the questions that
8 are under investigation. So that's -- that's a hard
9 question to answer.

10 Remember that, as my report reveals, I
11 have a much broader gauged approach than many
12 historians in that I consider statistical evidence
13 at some length in a variety of ways, and I also
14 consider legal documents in ways that not every
15 historian does. So having worked on voting rights
16 litigation for 40 years, I have a lot of experience
17 in evaluating what is relevant and what's not due to
18 the claims in this lawsuit.

19 Q Ultimately you're relying on your
20 experience in this -- in this space to be able to
21 determine what is relevant and what is not; is that
22 fair?

23 A Could you repeat that question? I'm not
24 sure I caught every word.

25 Q Sure. So ultimately the kind of

1 methodology that you're using to determine what's
2 relevant for your review and preparing your report
3 is the experience that you've had in voting rights
4 cases over decades to know what is relevant and what
5 is not; is that a fair statement?

6 A Well, that's not all. You know, the work
7 that I did as a historian before 1980 is also
8 relevant, and -- excuse me -- it's the case that I
9 draw on my traditional historical training as well
10 as my unusual use of regression analysis and other
11 forms of statistical analysis that helps to inform
12 the work that I do, and my scholarly writing draws
13 on my experience both in a -- in my academic
14 training and my experience working on voting rights
15 matters.

16 Q Thank you.

17 And you mentioned that your method is
18 broader than a lot of historians. Are there other
19 historians who use the methodology that you're
20 describing to reach opinions and do historical
21 research?

22 A Oh, yes. One way of imparting this trend
23 is to emphasize journals, and also in my educational
24 background when I was in graduate school at
25 Princeton all graduate students took a course

1 entitled Interdisciplinary Approaches to History,
2 and we were all encouraged to learn from other
3 disciplines, and among those that I learned the most
4 from was political science. I had a course in
5 quantitative methods, which was unusual in graduate
6 school and history departments, especially in the
7 1960s.

8 The professor that taught me quantitative
9 methods, Theodore Rabb, was one of the co-founding
10 editors of the Journal of Interdisciplinary History
11 in which historians who do social science research
12 like me regularly publish.

13 The journal -- the organization Social
14 Science History publishes a journal called Social
15 Science History in which actually in one of my
16 publications appeared. So there's a major school of
17 historical research that is considered
18 nontraditional that engages in social science
19 analysis of a variety of different types.

20 And some of the historians who were --
21 some of the persons who developed the technique
22 known as ecological regression analysis as a method
23 of analyzing voting behavior were historians, Allan
24 Lichtman at American University, and J. Morgan
25 Kousser of Caltech.

1 Q Thank you.

2 Let's go ahead and start with your report.
3 I want to start with the first paragraph --
4 unnumbered paragraph there on page 1. You say that
5 you've been asked by attorneys for the plaintiff in
6 this litigation to assist the court in assessing the
7 impact of the Voting Rights Act on Georgia's
8 historical policies and practices and the impact of
9 the removal of preclearance requirements based on
10 the Supreme Court's opinion in Shelby County versus
11 Holder.

12 So is that what you understood your
13 mission to be in preparing your report?

14 A That's only one aspect of it. I was
15 basically asked to focus on the racial effects of
16 Georgia's registration and voting practices. I'm
17 not sure how I came to put this as the first thing I
18 said in the report, but I was also asked to look at
19 the question of the impact of Voting Rights Act on
20 the policies and practices of election
21 administration in Georgia that are at issue in the
22 plaintiff's claim.

23 And, of course, two of my book chapters
24 were chapters in a co-authored book called The
25 Impact of the Voting Rights Act, so that's something

1 I regularly look at in my scholarly research.

2 Q So if we can head to paragraph 8, which is
3 on page 6 entitled Summary of Findings.

4 A Yes.

5 Q All right. So you -- I believe you just
6 said that your -- you were looking at the voter
7 registration practices in the state of Georgia; is
8 that right?

9 A Yes.

10 Q Okay. And the way I read your findings,
11 and you can tell me if I'm misreading this, the
12 first opinion you reach in paragraph 9 is about
13 Georgia's implementation of its voter verification
14 process under HAVA since 2006, and your opinion is
15 it has exercised a persistent discriminatory effect
16 on minority voters' opportunity to register and
17 vote.

18 Do you think that's a correct first
19 opinion that you offer in this report?

20 A Yes.

21 Q And then paragraph 10 on page 7 seems to
22 me to be the second opinion, which is the current
23 pattern of voter registration and voting in Georgia
24 bears a striking resemblance to the system of voter
25 registration in the Jim Crow era before 1965.

1 Would you agree that that's the second
2 opinion that you're offering in this report?

3 A That's certainly a second opinion. I'm
4 not sure that I have a list of opinions that I
5 offer, but I would agree that that's one of the
6 opinions I express.

7 Q Okay. And then in paragraph 11 you
8 express an opinion that the political context within
9 which the current registration system operates also
10 resembles the politics of Georgia before the
11 adoption of the 1965 Voting Rights Act. That kind
12 of is the third opinion you're offering in your
13 report; would you agree?

14 A Yes, it's a third opinion I offer.

15 Q Okay. Are there other expert opinions --
16 I'm not trying to pin you down with this, I'm trying
17 to frame where we're going to be discussing your
18 report. Are there other expert opinions you are
19 offering that are not covered by those three
20 categories?

21 A There are a lot of sort of subsidiary
22 opinions that I offer about these categories, but
23 those are -- that's a good way of characterizing the
24 categories of my opinions.

25 Q Okay. Now, one thing that I was looking

1 for in your opinion and wasn't -- your report and
2 wasn't able to locate is an opinion that Georgia --
3 any part of Georgia's voter registration system was
4 enacted with discriminatory intent.

5 Are you opining that any portion of
6 Georgia's voter registration practices and systems
7 were adopted with a discriminatory intent?

8 A No.

9 Q Okay. So given that, on the bottom of
10 paragraph 11 on page 8 you make a statement that
11 there is a powerful incentive for Republican
12 officials at the state and local levels to place
13 hurdles in the path of minority citizens seeking to
14 register and vote. That is what has happened, you
15 say.

16 It's your testimony that is not a
17 statement that any practice currently in effect is
18 intentional -- or, I'm sorry, was enacted with
19 discriminatory intent?

20 A That's correct.

21 Q Now, in your report it looks like you
22 focus primarily on the voter verification process's
23 so-called exact match process. Is that correct or
24 was it broad to the entirety of the registration
25 system in the state?

1 A It is focused on the voter verification
2 process utilizing an exact match. I do discuss
3 other aspects of election administration, but that
4 is the principal focus.

5 Q And as we kind of categorize them
6 categories 2 and 3, the way I read them, relate to
7 the entirety of the voter registration system in the
8 state. Am I reading that wrong, or are those
9 limited to the exact match process?

10 A Well, your question assumes limits that I
11 wouldn't impose on the impact of the exact match
12 requirement because everything in the administration
13 of elections in the years after the creation of the
14 methods of implementing HAVA in Georgia essentially
15 depended on the application of an exact match and
16 voter verification process.

17 It's also true that I mentioned the
18 discretion exercised by local registrars, for
19 example, but their understanding of how to operate
20 was conditioned in part on the -- the results of the
21 exact match aspect of the voter verification
22 process. And the core to understand about how --
23 how the voter verification process limited minority
24 opportunities to register is dependent on how the
25 exact match system operated.

1 Q So in your review did you review -- let me
2 ask this: To reach your opinion about the
3 discriminatory effects of the voter verification
4 exact match system, you're relying in part on the
5 work of Dr. McDonald and Dr. Mayer and some other
6 political scientists, correct?

7 A In addition, I'm relying on the analysis
8 of the Department of Justice underlying the adoption
9 of its 2009 objection to the voter verification
10 process, I'm relying in part on the assessment of
11 the HAVV system by the Social Security
12 Administration reflected in the Inspector General's
13 report in -- the Inspector General of the Social
14 Security Administration, and I'm including also the
15 analysis of the voter registration process by Gary
16 Bartlett, the election director for almost 20 years
17 in the state of North Carolina, who is a highly
18 respected election administrator.

19 Q And as to your opinions, the first
20 category of opinions we discussed, Georgia's voter
21 verification process exercised a persistent
22 discriminatory effect, that is the only opinion
23 about a discriminatory effect in your report; is
24 that correct?

25 A First of all, are you asking only about

1 the period of HAVA implementation?

2 Q What I'm trying to get to -- maybe I can
3 give you some background what I'm trying to
4 understand about your opinions.

5 So categories 2 and 3 about the
6 resemblance to the Jim Crow era of the voter
7 registration system and the political context
8 resembling the politics before the Voting Rights
9 Act, I don't read those as opinions that there's a
10 discriminatory effect of a particular practice; it's
11 more like a global view.

12 My question is: As to the specific
13 practices that Georgia utilizes for its voter
14 registration system, the only opinion you're
15 reaching about a racially discriminatory effect is
16 as to Georgia's implementation of its voter
17 verification process under HAVA since 2006, correct?

18 A No, not correct. My historical account of
19 the period before 1965 clearly establishes that
20 there was a discriminatory effect, not surprising
21 since the effects of the system were determined by
22 the formula -- coverage formula for the Voting
23 Rights Act in 1965 as justifying Georgia being
24 placed under the special provisions, including the
25 elimination of the literacy test and the

1 establishment of the preclearance process. That was
2 all because of the discriminatory effects revealed
3 in the -- in the racial disparities in voter
4 registration in Georgia.

5 Q So is it your testimony then that
6 opinion -- the second category of opinions that the
7 current pattern of voter registration in voting in
8 Georgia has a discriminatory effect in total?

9 A I'm sorry?

10 Q I didn't see that in your report.

11 A I'm not understanding your question. What
12 I said in the report is that there was a racially
13 discriminatory effect in the operation of Georgia's
14 registration system before 1965, and that there is,
15 in the period of HAVA implementation, also a
16 racially discriminatory effect.

17 Q Got it. Okay. That helps clarify what I
18 was looking for.

19 So in terms of the opinions, then, the
20 only racially discriminatory effects that you are
21 opining about as far as specific practices are the
22 entirety of the registration system prior to 1965
23 and the implementation of voter verification under
24 HAVA since 2006. Is that correctly framing that
25 now?

1 A I think that's correct.

2 Q Okay. You don't disagree with it?

3 A I don't disagree with it. It's possible I
4 expressed an opinion that I'm not calling to mind
5 about the HAVA implementation period, but -- but I
6 was certainly focused on the voter verification
7 process.

8 Q And so then in light of that, then it's
9 correct that you are not opining that the entirety
10 of Georgia's voter registration system as it stands
11 today has a racially discriminatory effect on
12 minority voters?

13 A Well, you weren't listening to my earlier
14 answer, I think. What I said --

15 Q I know you want to clarify -- I don't want
16 to interrupt you, but I know you'll clarify. I
17 understand you believe the voter verification
18 process touches every part of the registration
19 process.

20 A Yes.

21 Q But then you also seem to be saying that
22 you are not opining as to the entire registration
23 process today; you're limiting your opinion to the
24 voter verification implementation since HAVA. I
25 want to understand what your opinion actually is.

1 A Well, if you understand what you said at
2 the beginning of your statement, you understand that
3 if it necessarily affected every part of the
4 registration process, it's hard for me to cabin that
5 to saying it has no effect on the registration
6 process because I think it had much broader
7 implications for the whole registration process, and
8 so I'm puzzled by your questions.

9 Q So maybe I can ask it this way: If
10 Georgia completely eliminated its current voter
11 verification system, would it still be your opinion
12 that Georgia's voter registration system has a
13 racially discriminatory effect on minority voters?

14 A Sorry, I didn't mean to interrupt.
15 Probably, probably not, but it's a hypothetical, and
16 I'm uncomfortable with hypotheticals even though I
17 teach in a law school.

18 Q This is my chance to finally ask a
19 professor some good hypotheticals. Here we go.

20 Let's do this, Dr. McCrary. Let's go to
21 document number 13. We're going to mark this --

22 A Document 13.

23 Q -- Brennan Center report.

24 A Okay.

25 Q Are you familiar with the Brennan Center

1 for Law and Justice?

2 A Yes.

3 Q Are you familiar with the --

4 MS. FINK: Are you marking it as an
5 exhibit?

6 MR. TYSON: Yes. I'm sorry, I was
7 trying -- Exhibit 10. We'll mark that Exhibit 10.

8 (Defendant's Exhibit 10 was marked for
9 identification.)

10 BY MR. TYSON:

11 Q Dr. McCrary, are you familiar with the
12 Brennan Center's opinions related to elections?

13 A In general, but I don't remember seeing
14 this document.

15 Q Okay. I want to ask you about a couple of
16 things on page 3 of the report. That's using the
17 numbers at the bottom of the page.

18 A I'm there.

19 Q So you see the title that says Protect and
20 Expand Voting?

21 A Yes.

22 Q The first item on that list says Enact
23 Automatic Voter Registration. You see that?

24 A Yes.

25 Q Do you know if Georgia has automatic voter

1 registration?

2 A It does not.

3 Q You'd agree that automatic voter
4 registration makes it easier for individuals to
5 vote, correct?

6 A Yes.

7 Q Did you look at the question of Georgia's
8 use or nonuse of automatic voter registration in
9 forming the opinions in this report?

10 A No.

11 Q Second item on the document there says
12 Expand Early Voting. Does Georgia have early
13 voting?

14 A It has -- I'm forgetting exactly how they
15 treat absentee voting, so it's not something I
16 analyzed in this report.

17 Q So you didn't look at how Georgia
18 implements early voting at any point in preparing
19 your report, correct?

20 A Not that I recall.

21 Q The third section there, Modernize the
22 Voting Process, Protect Voting Rights, and Secure
23 Elections Against Foreign Interference, talks about,
24 number one, Upgrade and Secure Voting
25 Infrastructure. Do you see that section?

1 A Yes.

2 Q Did you at all review whether Georgia has
3 taken any steps to upgrade the security of its voter
4 registration database?

5 A Yes.

6 Q You did review that question?

7 A Yes. I don't address it in the report,
8 but I did review it.

9 Q Okay.

10 A Example, I read the opinions in Curling
11 versus Kemp.

12 Q But you didn't rely on those opinions in
13 reaching the opinions in your report, correct?

14 A I did not.

15 Could I interrupt you for just a moment?

16 Q Yes.

17 A Getting awfully warm. I was wondering if
18 anyone would be offended if I took off my sport
19 coat?

20 Q Not at all.

21 A Be back in a moment.

22 (Brief recess.)

23 BY MR. TYSON:

24 Q We can put the Brennan Center document
25 away and return back to your report, Dr. McCrary.

1 A Okay.

2 Q In working towards your opinions in the
3 report, did you speak to any county voter registrars
4 in Georgia?

5 A No.

6 Q Did you conduct any review of the methods
7 by which Georgians are able to register to vote?

8 A Yes.

9 Q And what did that review involve?

10 A Well, I looked at aspects of -- I'm sorry,
11 are you asking about how people are able to register
12 to vote?

13 Q Correct. If that was part of your review.

14 A Yes. And the fact that I may not have
15 total recall of every aspect of how absentee voting
16 is treated doesn't mean that I didn't look at it at
17 one point, and I did not see that as central to the
18 issues I was investigating, but I tried to
19 familiarize myself by looking at all the training
20 materials, the official election bulletins, I came
21 upon PowerPoint presentations, and -- what's the
22 other term -- webinars by which registrars were
23 trained, but I can't say that I have total recall of
24 everything in the training materials.

25 Q Certainly. Did you review Georgia's

1 online registration process?

2 A I looked at it, yes. I reviewed it in
3 that sense, but I didn't carefully analyze it as a
4 part of my investigation.

5 Q Did you review Georgia's app-based
6 registration processes?

7 A No.

8 Q And you reached a conclusion about the
9 discriminatory effect of Georgia's voter
10 registration system, but you didn't look at
11 automatic voter registration -- the methods by which
12 Georgians can register to vote; is that correct?

13 A No, I didn't recall every aspect of how
14 they register to vote, but I did look at it, and I
15 focused on that part that was related to the voter
16 verification process.

17 Q Did you review materials related to how
18 many voters go through the voter verification
19 process, or did you assume that every voter goes
20 through the verification process?

21 A The way I read the Secretary of State's
22 website and training and the laws that were adopted,
23 everyone has to go through voter verification
24 process.

25 Q And if only a subset of voters had to go

1 through the voter verification process, would that
2 change your analysis?

3 A If that were true it would change my
4 opinion as to that percentage for which it's not
5 true.

6 Q Okay. And so if only paper applications,
7 for example, went through the verification process,
8 you would then conclude that there was no
9 discriminatory effect as to nonpaper applications;
10 is that correct?

11 A I'm not sure -- you're going to have to
12 rephrase that question. Sounded to me like you
13 contradicted yourself.

14 Q Certainly. Let me do this, I will posit
15 it as a hypothetical to you. Assume for purposes of
16 this question that not all voter registration
17 applications go through the voter verification
18 process. Further assume that the only registration
19 applications that go through the verification
20 process are paper applications, not applications
21 received through the Department of Driver Services,
22 online voter registration, or the app. Are you with
23 me so far?

24 A By the DDS part of your question, are you
25 talking about the process of DDS giving voter

1 registration opportunities to individuals when they
2 apply for a driver's license, is that what you're
3 asking about?

4 Q Yes, so I am excluding for purposes of
5 this hypothetical Department of Driver
6 Services-initiated verification process records
7 through whatever method. If the application comes
8 from a driver services office, I want you to assume
9 for purposes of this question that those are not
10 included in the verification process. Are we clear
11 on that?

12 A Yes.

13 Q Okay. So if we assume those things in
14 this hypothetical, would your opinion then be that
15 because the voter verification process does not
16 apply to any voter registration applications except
17 those coming from paper in the hypothetical that
18 there is not a discriminatory effect except for
19 those voter registrations that come via paper
20 application?

21 A I have trouble with hypotheticals because,
22 first of all, you're not putting any numbers on the
23 categories. My understanding is that not very
24 many -- not a very large number of persons and not a
25 very large percentage of persons who succeed in

1 getting registered come through the motor voter
2 procedure at DDS or its equivalent in other states.
3 So if, in fact, the facts in your hypothetical are
4 true, it would -- it would be true that anything
5 that doesn't go through the voter verification
6 process I have not addressed in this report. I just
7 don't know what the numbers are.

8 Q I believe a minute ago you said that if
9 Georgia were to hypothetically completely eliminate
10 its voter verification process, your opinion that
11 Georgia's voter registration system has a racially
12 discriminatory effect would change. Am I
13 characterizing your testimony correctly?

14 A Yes, depending on what the numbers show.

15 Q And in that scenario, I guess that's why I
16 thought my hypothetical would be easier, because if
17 there is a subset of voters to whom the verification
18 process does not apply, then it would seem logical
19 that then there could not be a racially
20 discriminatory effect as to that subgroup no matter
21 what size it is. Do you disagree with that?

22 A Well, this is the first time I've ever
23 thought about that hypothetical. And so, for
24 example, I don't know enough about how the motor
25 voter process operates in Georgia in terms of how

1 successful the DDS agency is in processing voter
2 registration applications. That's often a problem
3 in other states. I don't know what the facts are
4 with regard to Georgia.

5 So, I mean, if, for example, it turns out
6 to be 1 percent of the registered voters in Georgia,
7 then it wouldn't be a very significant exception to
8 the voter verification process, but I just don't
9 know the facts about it.

10 Q And in preparing your report, you didn't
11 attempt to uncover those facts. You strictly looked
12 at the verification process, correct?

13 A It's -- well, I didn't just look at the
14 voter verification process, but I did not examine
15 the operation of the DDS system of offering
16 registration opportunities to people.

17 Q Okay. Thank you.

18 Let's turn next to paragraph 17 of your
19 report on page 12. You indicate in that statement
20 you're talking specifically about the method of
21 assessing whether persons are legally registered
22 voters from 2008 to the present, and I wondered why
23 not back earlier than 2008? Was there a particular
24 reason why you chose 2008?

25 A Yeah, that's the period after which

1 Georgia was -- beginning with which Georgia was
2 implementing HAVA.

3 Q Okay. Let's turn next to paragraph 24 of
4 your report on page 19.

5 A Yes, I'm there.

6 Q And first of all, you reference that
7 Secretary of State Max Cleland was encouraging local
8 boards to appoint more black deputy registrars, and
9 there was a dismissal of a case involved there. Do
10 you know what party was -- Secretary Cleland was a
11 member of?

12 A Yes, he was a Democrat.

13 Q In footnote 32 also on that page you
14 indicate that when Georgia tried to cut back on the
15 availability of satellite registration in 1991, the
16 Department of Justice objected. Was Georgia also
17 still controlled by Democrats in 1991?

18 A Yes.

19 Q So then in paragraph 25 you start talking
20 about an objection from 1994 to some of the aspects
21 of Georgia's changes to comply with the National
22 Voter Registration Act. Do you see that?

23 A Yes.

24 Q What I'd like to do is refer you to
25 document number 14, and we'll mark this as Exhibit

1 11.

2 (Defendant's Exhibit 11 was marked for
3 identification.)

4 A Okay.

5 BY MR. TYSON:

6 Q And this is a printout from the Georgia
7 Laws regarding legislation, as you see here at the
8 beginning, to amend Title 21 to conform to National
9 Voter Registration Act of 1993. Do you see that?

10 A Yes.

11 Q If you could turn to page 24.

12 A Okay.

13 Q And there you see kind of two thirds of
14 the way down the page 21-2-234, you see: As used in
15 this code section, the term "no contact" shall mean
16 that the elector has not voted.

17 Do you see that language?

18 A Yes.

19 Q And did you at any part of your opinion in
20 your report review the list maintenance process
21 related to no contact?

22 A Yes, in the period of HAVA implementation.

23 Q Okay. And do you know what party was in
24 the majority in Georgia in 1994 when this
25 legislation was adopted?

1 A I believe that's the Democratic Party.

2 Q Next if you could turn with me to document
3 15, which we'll mark as Exhibit 12.

4 (Defendant's Exhibit 12 was marked for
5 identification.)

6 A Yes, I'm there.

7 BY MR. TYSON:

8 Q And I am assuming this is one of the
9 preclearance objection letters you've reviewed as
10 part of preparing your report?

11 A Yes.

12 Q And at the beginning there you see that
13 the Attorney General objected about the provisions
14 of no contacts during the three-year period at the
15 bottom last paragraph on page 1?

16 A Yes.

17 Q And so this objection was to the no
18 contact procedures adopted by the Democratic
19 majority in 1994; is that a fair statement?

20 A Yes.

21 Q In your report you next say: In response
22 to this objection the state amended its objection
23 laws to comply with the NVRA.

24 Did you review those amended laws?

25 A I did, but I can't recall the specific --

1 the specific law in question.

2 Q I can help with that if you can look at
3 document number 16 before you.

4 A Document 16 is the 1997 law.

5 Q Correct. And did you review on page 1 --
6 page 2, section 2, there's an amendment to the no
7 contact process. Do you see that?

8 MS. FINK: Can we mark this one as Exhibit
9 13?

10 MR. TYSON: This is 13, yes. I'm sorry,
11 Sarah. This is 13.

12 (Defendant's Exhibit 13 was marked for
13 identification.)

14 A Yes, I see it.

15 BY MR. TYSON:

16 Q Okay. So is this the law that you're
17 referring to the state amended its election laws to
18 comply with the NVRA?

19 A Yes.

20 Q Then let me give you one more on this
21 point, document 17, which we'll mark as Exhibit 14.

22 (Defendant's Exhibit 14 was marked for
23 identification.)

24 A Okay.

25 BY MR. TYSON:

1 Q This is an entry from the House Journal in
2 1997?

3 A Yes.

4 Q And page 5, the last page there, is the
5 vote on the 1997 legislation. You with me on that?

6 A This is under section 3. Yes.

7 Q You see that that vote was unanimous,
8 correct?

9 A That's correct.

10 Q Okay. So going back to your report -- you
11 can set those '94 and '97 documents to the side.

12 A Okay.

13 Q Going back to your report in paragraph 26
14 on page 21 you mentioned that the Department of
15 Justice blocked 177 proposed changes to election
16 laws in Georgia. You'd agree with me, wouldn't you,
17 that most of those objections came prior to the year
18 2000?

19 A Yes.

20 Q And when you say on paragraph -- the
21 bottom of 26: The department found that each had a
22 retrogressive impact on voters of color in Georgia,
23 could the department also have found that the state
24 didn't submit sufficient evidence to determine there
25 was not a retrogressive impact on voters of color?

1 A That's a better way of phrasing the legal
2 burden under a Section 5 review, and I like that
3 wording better.

4 Also, I would correct that sentence in
5 that there were some objections that were
6 purpose-based and not based on retrogressive effect.
7 Small number.

8 Q I'm assuming you have not reviewed, or
9 have you reviewed every single objection from 1965
10 to Shelby County for Georgia?

11 A I have reviewed and analyzed and written
12 about every objection from 1965 through mid 2004 for
13 a Law Review article on the end of preclearance, but
14 I have not examined -- I actually looked at all the
15 objection letters on -- in periods since -- since
16 2004 for Georgia in connection with this report.

17 Q But I think you agreed with me earlier,
18 though, there's not an affirmative finding of
19 retrogressive impact in every one of those, there
20 could also be a determination of the state or the
21 county had not submitted sufficient evidence of a
22 lack of retrogressive impact, correct?

23 A Usually the objection letter phrases it as
24 you just did, and that is because that's the way --
25 that's the language of Section 5 of the Voting

1 Rights Act.

2 The burden is on the jurisdiction in a
3 Section 5 review, whereas it's on the plaintiffs in
4 a Section 2 lawsuit or some other kind of legal
5 claim, and the objection letter reflects the burden
6 that the Act imposes on jurisdictions. So I was
7 careless in saying that each objection had a
8 retrogressive impact. I should have phrased it more
9 carefully as you did. The jurisdictions had not met
10 their burden.

11 Q Thank you.

12 The next section of your report looks at
13 the adoption of DREs in Georgia. Initially I was
14 curious in terms of if you're looking at voter
15 registration why you looked at voting machines as
16 part of that analysis. Can you give me a little bit
17 of understanding of that, please?

18 A Yes, I looked at that because it was
19 associated with the whole process of HAVA
20 implementation, and I thought it was useful to
21 include that discussion because it included a
22 consideration of that part of the voting system to
23 which the voter registration process led. I suppose
24 one could argue that it was not relevant, but it
25 seemed to me part of the story.

1 Q Let's turn next to -- actually, let me ask
2 you this question first: In footnote 37 you cite to
3 the report of the 21st Century Voting Commission
4 from December 2001. Did you review that report as
5 part of preparing your expert report here?

6 A Yes.

7 Q If you could turn with me to document 18,
8 which we'll mark as Exhibit 15.

9 (Defendant's Exhibit 15 was marked for
10 identification.)

11 A Okay.

12 BY MR. TYSON:

13 Q Does this appear to be -- is it a copy of
14 the 21st Century Voting Commission report?

15 A Yes.

16 Q And if you could turn to page -- physical
17 page 20, page number 19.

18 A Okay, I'm on page 19 of the report.

19 Q Okay. And there's a bullet at the top of
20 that paragraph -- I'm interested in the paragraph
21 that begins, "The data indicates that, across the
22 board."

23 A Uh-huh.

24 Q And the report found that the percentage
25 of undervotes on paper ballots was higher than

1 the -- in predominantly black precincts than in
2 predominantly white precincts. Do you see that
3 conclusion?

4 A I'm actually -- I need to review this
5 because I'm not seeing that. First of all, it
6 begins by discussing overvotes, not undervotes. Let
7 me read the paragraph.

8 Q Certainly. Please take your time.

9 A Okay, I've read the paragraph. You want
10 to repeat your question?

11 Q Yes. So you see the commission found that
12 there was an undervote gap that was greater in
13 counties that used paper ballots, and the highest
14 undervote percentages were in African-American
15 precincts using those paper ballots. Do you see
16 that portion?

17 A You're talking about in a separate
18 paragraph?

19 Q Third paragraph, "The data indicates that,
20 across the board."

21 A I was looking for reference to that in the
22 paragraph you called my attention to first. I'm
23 sorry, I'll have to look at the --

24 Q I apologize.

25 A Okay, I see that now. What was your

1 question?

2 Q Well, first I was going to ask you if you
3 saw it. I'm glad we're on the same page now. Would
4 you agree, based on your analysis of the adoption of
5 the DREs in Georgia in your report, that at least
6 one basis for Secretary Cox moving toward electronic
7 voting was to rectify a disparity on the impact of
8 African-American voters when paper ballots were
9 used?

10 A Yes, and I thought that's what I said in
11 my report relying in part on the analysis of
12 political scientist Charles Stewart, who did a very
13 careful analysis in an unpublished paper of the
14 subject matter that the commission was addressing.

15 Q Thank you.

16 I'm assuming you would support a voting
17 system that allows -- that corrects undervotes for
18 African-American voters, and you believe that was a
19 good policy decision for Georgia to move to that
20 system; is that correct?

21 A I would -- without even referencing the
22 race of the voters, I think it's -- a system should
23 cut if not eliminate undervotes and overvotes.

24 Q Uh-huh. If you could put the commission
25 report away. If you could turn to paragraph 35 of

1 your report.

2 A Okay.

3 Q In this paragraph you talk about the
4 efforts that staff and Diebold and Center for
5 Election Systems went through. Did you look at all,
6 as part of your report, at Georgia's new voting
7 system of ballot-marking devices or how those were
8 implemented?

9 A No.

10 Q And in paragraph 36 you indicate about
11 halfway through that paragraph, initial success
12 would not, as it turned out, be replicated in coming
13 years, as the new DREs aged and the impressive
14 training of election administrators and the staff
15 they supervised is replaced with less intensive
16 training efforts.

17 How did you determine that the training in
18 2002 was impressive?

19 A That was the analysis of Professor Stewart
20 and also Professors Alvarez and Hall in the article
21 they co-authored that I cited.

22 Q And are you also relying on those
23 professors for your conclusion that the impressive
24 training was replaced with less intensive training
25 effort?

1 A There I am -- there I am going on my
2 reading of the training materials in the last 10
3 years and the analysis of those materials by Gary
4 Bartlett in his expert report in the 2016 case.

5 Q And did you analyze all the training
6 efforts in the training materials related to DREs?

7 A I think I read almost all of them. I
8 can't -- I don't have any recollection of any that I
9 did not include, but I didn't cite them all.

10 Q The next section of your report addresses
11 realignment in the Georgia party system.

12 A Yes.

13 Q I want to go to paragraph 39.

14 A Okay.

15 Q You talk about the secular realignment of
16 white voters leaving the Democratic Party and
17 switching to the Republican Party, and you mention
18 the 2002 gubernatorial election as accelerating that
19 process. And my -- at the end of paragraph 39 what
20 I want to ask about that is as a result you say:
21 Decisions about voter registration, election
22 administration, and the machinery by which ballots
23 were cast in 2002 reflected the policy preferences
24 of the Republican Party, and you're citing to an
25 article by Dr. Bullock for that statement.

1 Is it your -- are you making that
2 statement simply because Republicans were the
3 majority party, or are you saying that Republicans
4 have particular policy preferences about voter
5 registration, election administration, and the
6 machinery by which ballots are cast?

7 A In that sentence I'm simply referring to
8 the fact that they controlled the majority in the
9 legislature and the governorship, and after 2004,
10 2006, I forget which, Secretary of State's Office.

11 Q And in paragraph 40 you say: In
12 white-majority Georgia, Republicans benefited from a
13 pattern of voting that was polarized along racial
14 lines.

15 And you'd agree with me that from 1965 to
16 2002, racially polarized voting was not beneficial
17 to Republicans in Georgia; is that correct?

18 A That's correct, it benefited whatever
19 party was the dominant party in the state, and
20 before 2002 -- for much of the time before 2002 it
21 was Democratic Party or it was becoming more evenly
22 balanced.

23 Q In paragraph 41 on the next page you're
24 talking about a study by Dr. Bullock and Dr. Gaddie
25 indicating -- about -- towards the end of that

1 paragraph you indicate that between 30 and 40
2 percent of white voters in the state supported
3 Democratic candidates in the 1990s, but only about a
4 quarter of whites voted Democratic beginning in
5 2002.

6 Have you looked at any racial polarization
7 analysis on a statewide level in Georgia after this,
8 after the Bullock and Gaddie study?

9 A Yes. For one thing I cite -- you're
10 asking about statewide patterns as opposed to
11 patterns for a portion of the state?

12 Q Correct. I know you cite the Gwinnett
13 County cases and some of those other specific ones
14 in parts of the state.

15 A I looked at a number of studies that cite
16 exit poll data or -- exit poll data during a period
17 up through at least 2014, and I cite them in the
18 report.

19 Q You did not review any studies that
20 conducted an ecological imprint analysis of racial
21 polarization, you only used exit poll data up to
22 that 2014 date for the state statewide?

23 A Actually, I also looked at a second book
24 by Chuck Bullock and Keith Gaddie called, I think,
25 The Rise and Fall of the Voting Rights Act, and my

1 recollection is they also have data on racial
2 polarization after this initial book, The Triumph of
3 Voting Rights in the South in 2009. I don't --

4 Q The end of paragraph -- I'm sorry?

5 A I don't think I cited the second Bullock
6 and Gaddie book, though, in the report.

7 Q At the end of paragraph 41 you say: Such
8 polarized voting is evidence of vote dilution, of
9 course, only in contests where minority
10 candidates -- minority-preferred candidates usually
11 lose.

12 And you'd agree with me that in the 2018
13 governor's race in Georgia, Ms. Abrams came within a
14 little bit more than 50,000 votes of winning an
15 outright majority, correct?

16 A Yes.

17 Q And have you conducted any racial
18 polarized voting analyses of that race in 2018 to
19 determine her level of support among white voters?

20 A I have not.

21 Did you have a question about the sentence
22 that you called my attention to or not?

23 Q That was the setup for my question
24 about --

25 A Okay.

1 Q -- 2018. Yeah.

2 So let's turn to paragraph 45. We're
3 talking there about the 2008 election.

4 A Yes.

5 Q And the second paragraph -- second
6 sentence there indicates that the same percentage of
7 white voters voted for Obama in 2008 as voted for
8 Democratic nominee John Kerry in 2004. How do you
9 determine when there's same level of support for an
10 African-American candidate and the same level of
11 support for a white candidate among white voters
12 that the polarization you see is racial and not
13 political?

14 A Well, it's obviously political, and what
15 I'm talking about there is, as I go on in that
16 paragraph to discuss, is other aspects of the voting
17 patterns in 2008. That sentence is not the
18 principal subject matter of the paragraph.

19 Q I'm sorry to step back a couple, but in
20 paragraph 43 I see you discussing the level of white
21 turnout versus black turnout in various elections.
22 You see that?

23 A Yes.

24 Q I didn't find -- maybe I was missing it,
25 but I didn't find turnout rates by race for any

1 election after 2004 in your report with the
2 exception of -- I see you cover 2008 as far as the
3 racial breakdown, but in terms of turnout by white
4 and black voters, I didn't find any election after
5 that. Did you leave those out on purpose?

6 A No, I didn't -- I don't think I had any --
7 I don't think I encountered any studies that
8 discussed that subject matter, and I did not try to
9 conduct an analysis myself in the years after 2008.

10 Q You're familiar, I'm assuming, with the
11 current --

12 A I'm sorry, I paused. In terms of
13 statewide patterns as opposed to local patterns.

14 Q Certainly, yes. And for these I'm
15 definitely focusing statewide. I know that there's
16 specific cases later.

17 You're familiar, I'm assuming, with the
18 Current Population Survey from the Census Bureau?

19 A Yes.

20 Q And that's what Dr. Bullock and Dr. Gaddie
21 used in footnote 79 that you reference on the
22 estimates of registration and turnout by race
23 published by the census when they gave the turnout
24 numbers you cited; is that correct?

25 A Yes.

1 Q I want you to turn to document 19, which
2 we'll mark as Exhibit 16.

3 (Defendant's Exhibit 16 was marked for
4 identification.)

5 BY MR. TYSON:

6 Q This is Table 4b from the CPS report for
7 November 2008 you can see there at the top. I have
8 hidden the rows for states other than nationwide and
9 Georgia. So do you see -- I'm sure you're familiar
10 with generally how these reports look.

11 A Yes.

12 Q Is that right?

13 A Yes.

14 Q And looking at the column percentage
15 voted, you'd agree with me that in terms of total
16 voted percentage for the 2008 election, black alone
17 or in combination is six points higher than whites
18 alone or in combination in Georgia.

19 A I'm sorry, I have to line up the rows.
20 Okay, ask your question.

21 Q You'd agree with me that the total voter
22 percentage for black alone or in combination is
23 higher in November 2008 than white alone or in
24 combination, correct?

25 A That's correct. You're asking me -- I

1 thought you were asking me white alone and black
2 alone.

3 Q So I was asking you first about white
4 alone or in combination and black alone or in
5 combination.

6 A I'm sorry, but I have to use a straight
7 line to read the table correctly here.

8 Yes, I would agree black turnout in Census
9 Bureau estimates is slightly higher than the white
10 or Hispanic alone. Did you ask me in combination?

11 Q Yes. Then if you can look at those in
12 combination, and the question is the same: Would
13 you agree that black alone or in combination is
14 higher turnout than white alone or in combination
15 for the November 2008 election?

16 A Yes.

17 Q Okay. Now I'm going to ask you the same
18 questions for 2012 and 2018. So those are document
19 20, which we'll mark as Exhibit 17.

20 (Defendant's Exhibit 17 was marked for
21 identification.)

22 A See the same pattern in the 2012 election.
23 BY MR. TYSON:

24 Q And so the black voter turnout is higher
25 than white voter turnout for the 2012 election in

1 Georgia, correct?

2 A Yes, according to the Census Bureau
3 estimates.

4 Q And then document 21, which we'll mark as
5 Exhibit 18, same question for the 2018 election.

6 (Defendant's Exhibit 18 was marked for
7 identification.)

8 A Same pattern.

9 BY MR. TYSON:

10 Q So in the November 2018 election
11 African-American turnout is higher than white
12 turnout as well, according to the census Current
13 Population Survey?

14 A Yes. Yes.

15 Could I review this portion of the report
16 to see whether I left out a major point that I've
17 addressed in other reports?

18 Q Certainly.

19 A I see I left out the discussion that I
20 have always tried to include in discussing
21 participation rates when referring to the Census
22 Bureau estimates. And so since it's not in the
23 report, the only way I can explain what I was about
24 to say is if you'll indulge me to explain what's not
25 in the report.

1 Q And I'm certain you will be explaining to
2 me that it's an estimate and is self-reported, and
3 it is not actual turnout numbers.

4 A That's right.

5 Q Instead of doing that, let me just go to
6 two questions. Number one, you relied on the Bureau
7 of the Census numbers in paragraph -- footnote 79;
8 is that correct?

9 A 79?

10 Q On page 32.

11 A No, there's no discussion of the Census
12 Bureau estimates there.

13 Q Footnote 79: Bullock and Gaddie cite the
14 estimates of registration and turnout by race
15 published by the Bureau of --

16 A Footnote 79. I thought you said
17 paragraph. I'm sorry.

18 Q I'm sorry. We are getting late in the
19 afternoon.

20 A Well, I often cite the Census Bureau
21 reports that are estimates I should say, but point
22 out that there is a problem of overreporting that
23 is -- political scientists have found to be greater
24 among African-Americans than among whites.

25 But with that caveat, they're useful, and

1 they're useful for comparisons where you're trying
2 to compare one state that does not have racial data
3 on registration with voting with a state like
4 Georgia that does have those data. So the only way
5 you can compare the states is to use the Census
6 Bureau estimates.

7 All I'm saying is there's a qualification
8 to it, but the estimates tend to -- tend to suggest
9 a slightly higher turnout rate among
10 African-Americans than among non-Hispanic whites.

11 Q You didn't attempt to -- I'm sorry.

12 A They're still useful data, but they are
13 not as good as the official data that a state like
14 Georgia supplies.

15 Q And you didn't attempt to go and locate
16 the official data from Georgia about turnout rates
17 for any elections after 2004; is that correct?

18 A Actually, I think I did, but I may be
19 mixing up -- I may be mixing up reports. I may be
20 thinking about another case.

21 Q Okay. Moving to paragraph 46 -- sorry?

22 MS. FINK: Will you be getting to a
23 breaking point any time soon? Like to take a
24 five-minute break.

25 THE WITNESS: That would be useful.

1 MR. TYSON: This is actually a great time
2 to. Let's go off the record, and we can do a
3 five-minute break definitely.

4 (Recess 2:42-2:52 p.m.)

5 BY MR. TYSON:

6 Q Dr. McCrary, good news, I don't have any
7 more detailed spreadsheets for you to look at, so we
8 can move next to paragraph 46 of your report.

9 And in this survey about white voters
10 favoring and reporting that they're Democrats or
11 Republicans, I believe the citation is to survey
12 data from the Pew Research Center at footnote 86 and
13 not to any sort of regression analysis. This is
14 self-reported survey data, correct?

15 A That's correct. That's what Professor
16 Hutchings was relying on. I was actually --

17 Q Did you attempt --

18 A I was not actually looking at the Pew
19 data. I was looking at his analysis of the Pew
20 data.

21 Q Got it. And did you attempt to locate any
22 similar survey from the 2018 election?

23 A I attempted to find expert reports
24 after -- that would address that, but I never
25 located any.

1 Q In paragraph 47 you begin to discuss a
2 local election lawsuit in Gwinnett County. I
3 believe that was about county commission districts;
4 is that right?

5 A My wife came in and asked me if I wanted
6 the coat back on, and I -- I took it off for a
7 reason.

8 What was your question about the -- about
9 what the governing bodies at issue were?

10 Q The county commission I believe you said
11 involved local elections. I believe it was county
12 commission and school board. I realize it's not in
13 your report.

14 A I think it was both county commission and
15 school board, but that's my recollection. I didn't
16 say anything in the paragraph about it.

17 Q And are you aware that the lawsuit was
18 dismissed after the Democratic candidates were
19 successful in the 2018 election?

20 A Not with regard to the Gwinnett County
21 case. I am familiar with that in connection with
22 the challenge to two state house districts in
23 Gwinnett and Henry Counties.

24 Q So your testimony is you don't know if the
25 Gwinnett local election case you referenced in

1 paragraph 47 is still ongoing or not?

2 A I simply don't recall, as I sit here, what
3 the outcome of the case was.

4 Q So let's move to paragraph 48. You
5 reference two state house districts, and this is --
6 this is a case that you know was dismissed after the
7 Democratic candidates were successful in the 2018
8 election, correct?

9 A Was it the 2018 election? Yeah, I guess
10 it was.

11 Q Now, I want to ask you about footnotes 89
12 and 90. You're talking about some various expert
13 reports in both those Gwinnett local election case
14 and the state house district case. Where did you
15 obtain those declarations?

16 A In the case of the legislative case, I was
17 an expert in that case, and I suspect I got the --
18 frankly, I don't remember where I got the Engstrom
19 report in the Gwinnett County case, whether I found
20 it -- I often search Election Law at Moritz to find
21 documents filed in election law cases, and that
22 could be where I found it.

23 Q Did you review the report of Dr. Alford
24 that you reference in footnote 89 on page 36?

25 A Yes.

1 Q Let's go to document number 22, which
2 we'll mark as 19.

3 (Defendant's Exhibit 19 was marked for
4 identification.)

5 A Okay.

6 BY MR. TYSON:

7 Q Is this the report of Dr. Alford that you
8 reviewed in that Gwinnett County local election
9 case?

10 A It appears to be. Let me just check
11 something.

12 Actually, as I look in my footnote, I
13 don't think I cited to Professor Alford's report. I
14 was quoting from the Engstrom rebuttal to that
15 report.

16 Q Do you know then if you reviewed
17 Dr. Alford's report, or did you only rely on
18 Dr. Engstrom's report?

19 A I have reviewed a good many expert reports
20 by Professor Alford. I'm not sure I remember
21 reading this one.

22 Q Okay. There's only one -- couple
23 different sections, one particular -- two particular
24 places I want us to look together. Page 9 in the
25 blue numbers at the top at Exhibit 19.

1 A Okay.

2 Q Do you see the last paragraph that begins,
3 "In the one remaining election for the 2012 District
4 5 seat"?

5 A Yes.

6 Q Could you just review that paragraph, and
7 then it goes over on to the next page.

8 A Okay. Okay.

9 Q So you see Dr. Alford is discussing a race
10 where there was an African-American Republican
11 candidate who was overwhelmingly favored by the
12 white voters and overwhelmingly opposed by the
13 African-American and Hispanic and Asian voters; you
14 agree that's a fair characterization?

15 A Yes.

16 Q And on this basis Dr. Alford focused on
17 the issue of partisan polarization because the race
18 of the candidate didn't matter. In your review in
19 terms of relevance of information, do you believe
20 the race of the candidate assists the court or has
21 any role in determining whether something is
22 partisan polarization or racial polarization?

23 A It depends on the overall pattern. First
24 of all, notice that this is one election contest,
25 and I'm reluctant to draw a conclusion from one

1 election contest.

2 Secondly, it is often the case that
3 African-American voters vote against a candidate who
4 is also African-American because they perceive him
5 or her as being unsympathetic to the policy
6 preferences they have.

7 I would cite, for example, Tim Scott.
8 When I worked on a case in Charleston County, South
9 Carolina, in the justice department roughly almost
10 20 years ago, now Senator Scott was a member of the
11 county council. He was the only African-American
12 member on the county council. We found that --
13 Professor Arrington's expert analysis found that
14 Mr. Scott received about 5 to 10 percent of the
15 African-American vote the first time he ran for the
16 county council, and his black support went down in
17 every other election. So he fits the pattern of
18 H.K. Dido in this particular -- in this particular
19 example.

20 The issue in a voting rights case is the
21 rights of minority voters, not minority candidates.
22 So the question of who the minority voters prefer as
23 opposed to who the white voters prefer is what
24 experts and the justice department and the courts
25 look at. That's the standard for analyzing voting

1 behavior.

2 So if in this case Mr. Dido was not
3 perceived as sympathetic to the policy positions of
4 African-American voters, and actually in Gwinnett
5 also Hispanic and Asian voters, then he was not the
6 preferred candidate of minority voters.

7 And that doesn't suggest that it's -- that
8 there is a causal relationship, the fact that he is
9 a partisan is the reason for that voter choice.
10 It's the -- it's the positions that the voters
11 prefer.

12 And in the case of Mr. Dido, about whom I
13 know exactly nothing, if he were like Mr. Scott --
14 Tim Scott in Charleston County, there were reasons
15 why the African-American voters, and in this case
16 Hispanic and Asian voters, voted against him.

17 So that's an example of the complications
18 and complexities in trying to analyze causality,
19 which the -- which the courts have generally avoided
20 doing except in judicial election cases in my
21 experience. And the reason is that statistically
22 you can't separate the effects of party and race in
23 places like Gwinnett County or the state of Georgia
24 or Alabama or other southern states because of the
25 very high correlation between race and party,

1 particularly when it comes to African-American
2 voters, and the problem of multi-collinearity is a
3 problem that troubles any analysis of the causality
4 issue in connection with racially polarized voting.

5 Q So turning to page 13 at the top in the
6 blue numbers, the bottom of that page says --

7 A Are we still --

8 Q We're still in Dr. Alford's -- still in
9 Dr. Alford's report.

10 A Okay, his paragraph -- what are you
11 telling me to look for?

12 Q On the very top there's a row of blue
13 numbers, case number document filed.

14 A Yes.

15 Q Go to page number 13 on that.

16 A Okay.

17 Q There's a section titled Summary
18 Conclusions.

19 A Okay. I have read Professor Alford's
20 paragraph.

21 Q And so Professor Alford's conclusions are
22 that African-American voters vote cohesively for
23 Democrats, white voters vote cohesively for
24 Republicans. What led you to reject Dr. Alford's
25 criticisms of Dr. Engstrom and rely on Dr. Engstrom

1 for your statement in paragraph 47 of your report?

2 A Well, I think you've asked a compound
3 question that's confusing. If I may separate the
4 issues out, let me start the first point.

5 I don't find John Alford's conclusion in
6 that paragraph to be a sound analysis for the reason
7 I previously indicated. It's simply not correct to
8 say that he has demonstrated that the cause is
9 partisan rather than racial polarization.

10 Then you were asking some other things,
11 and I can't recall exactly what other aspects of the
12 question you want to ask about.

13 Q Well, I think you've answered the second
14 part, which was on what basis did you reject
15 Dr. Alford's conclusion that -- and endorse
16 Dr. Engstrom's. I think what I've heard you say is
17 you don't believe Dr. Alford's conclusions are
18 supportable. Is that fair to say?

19 A That's correct, but your -- your question
20 involves footnote 89 as I recall in my report, and
21 there you'll see that the point that Engstrom was
22 addressing didn't have anything to do with the
23 causality argument, it was his -- his criticism was
24 related to a few district elections where the small
25 number of precincts created problems for statistical

1 analysis, and it didn't resolve -- it didn't involve
2 the causality issue at all. So I wasn't actually
3 addressing this part of Alford's report in that
4 footnote.

5 Q Earlier on paragraph 47 you make the
6 statement: Non-Hispanic whites consistently
7 defeated minority-preferred candidates in
8 interracial contests, at the top of page 36 of your
9 report.

10 A Yeah, let me see what the beginning of the
11 paragraph deals with. We talking about the Gwinnett
12 County case?

13 Q Correct.

14 A Okay. What's your question?

15 Q So that's your statement. Wouldn't it
16 also be just as true to say Republicans consistently
17 defeated African-American-preferred candidates or
18 Democratic candidates -- sorry, let me start over
19 again.

20 Wouldn't it be consistent with the
21 statistical analysis to say Republicans consistently
22 defeated Democratic candidates in interracial or
23 interparty contests because we can't tease out party
24 and race?

25 A The answer is yes, but that's not the

1 standard that the courts are considering in a case
2 such as this. And, in fact, this isn't the case
3 involving political gerrymandering, which the courts
4 also don't want to go to.

5 But where the question is related to the
6 racial effect of -- of an election practice,
7 whatever it is, in here we're talking about a
8 dilution case, then the Supreme Court in Thornburg
9 versus Gingles rejected the causality defense. I'm
10 embarrassed to say they actually relied on
11 discussion of the causality defense in a Law Review
12 article I published which they cited and quoted in
13 the text of Gingles.

14 But there are courts in cases involving
15 the election -- the method of electing judges who
16 have taken a different view of that question of the
17 causality question, which I think is -- is setting
18 up a standard of proof in a voting rights case
19 that's impossible for plaintiffs to meet because of
20 the multi-collinearity problem.

21 Q Thank you. We can put away Dr. Alford's
22 report now.

23 So let's move to your report, paragraph
24 49, top of page -- bottom of page 37, top of page
25 38.

1 A Okay.

2 Q You make the statement there: Because
3 minority voters routinely support Democratic
4 candidates, Republicans stood to benefit from making
5 registration and voting by minority citizens more
6 difficult.

7 You're not saying that Republicans
8 intentionally made it more difficult, correct?

9 A That's correct.

10 Q And in footnote 95 on page 38 you're
11 discussing Dr. Hood and Dr. McKee's report. You'd
12 agree with me that Dr. Hood's report is a survey of
13 voter perception, not necessarily a survey of
14 particular election practices and their use; that
15 correct?

16 A Let me -- let me work back to the Hood and
17 McKee. Ask your question again.

18 Q The Hood and McKee report you cite was a
19 survey of what voters perceived as issues, not what
20 were or were not actual issues of election
21 administration; is that correct?

22 A I think that's correct now that I
23 understand your question.

24 Q So you'd agree that it's a survey of voter
25 perception, not a study of particular election

1 practice?

2 A That particular article which they
3 published is -- is not about the particular election
4 practice, yes.

5 Q And you'd agree it's a survey of voter
6 perception?

7 A I actually don't remember that aspect of
8 their article very well.

9 Q Let's go to document 26. We'll mark it as
10 Exhibit 20.

11 (Defendant's Exhibit 20 was marked for
12 identification.)

13 A Yes, you were right.

14 BY MR. TYSON:

15 Q The Hood and McKee article, you agree now,
16 having reviewed Exhibit 20, was a survey of voter
17 perception?

18 A Yes.

19 Q Okay, great.

20 A I'm trying to see the context in which I
21 cited that. That was actually a conclusory
22 statement they made in their article.

23 Q Uh-huh.

24 And the conclusory statement that you're
25 referencing is the statement at the end of paragraph

1 49 of your report?

2 A That's correct.

3 Q Okay. Let's skip ahead to paragraph 53 of
4 your report. Now we're into the part of your report
5 about immigration and citizenship issues. In
6 paragraph 53 you're discussing the state's adoption
7 of Senate Bill 529 in 2006.

8 A Yes.

9 Q You mentioned that two key provisions
10 required verification of citizenship for either
11 applications for employment or applications for
12 public benefits.

13 Is it unusual among states or have you
14 looked at other states to determine the rate at
15 which those states require citizenship verification
16 for either of those applications for public
17 benefits?

18 A It's not uncommon for states to do that.
19 I was discussing the particular adoption in Georgia
20 and the things said in connection with justifying
21 it.

22 Q In paragraph 54 you discuss that federal
23 funding -- there was a provision for state law
24 enforcement assisting in the enforcement of federal
25 immigration laws, and you mentioned federal funding.

1 It's correct, isn't it, that it was federal law that
2 allowed local law enforcement to assist in enforcing
3 immigration laws, correct?

4 A Yes, that's why there's a memorandum of
5 understanding between the federal agency and the
6 state. In that particular sentence that's what I
7 was referring to.

8 Q Okay. On the top of page 43, the end of
9 paragraph 54 you say: These new functions would
10 likely have a significant effect on the state's
11 Hispanic or perhaps Asian residents.

12 What are you using to determine what --
13 that there would likely have a significant effect on
14 Hispanic and Asian Georgians?

15 A Well, I have to read the context in the
16 paragraph.

17 Well, I meant simply that most of the
18 persons who were noncitizens in Georgia were either
19 Hispanic or Asian, although one study suggested
20 there were also African noncitizens in significant
21 degree in certain Georgia counties along with
22 perhaps noncitizens from the Caribbean.

23 Q In paragraph 55 you state that Governor
24 Perdue's statements when signing Senate Bill 529
25 used inflammatory language that rose to the level of

1 demagoguery.

2 A Yes.

3 Q How did you determine it was inflammatory
4 and rose to a level of demagoguery?

5 A I read the sentence quoted in the next
6 sentence of that paragraph.

7 Q Okay. And on footnote 111 you indicate
8 that Lieutenant Governor Cagle or then State Senator
9 Cagle said the issue of dealing with the impact of
10 illegal aliens on the healthcare system is a
11 significant one for Georgia, and you're saying that
12 that was also incorrect, that there was not an issue
13 with undocumented individuals affecting healthcare
14 coverage in Georgia?

15 A That's the conclusion I drew from the
16 study that I cite in subsequent paragraphs that, in
17 fact, the citizens don't -- noncitizens don't have
18 access to healthcare in Georgia.

19 Q In paragraph -- sorry, in footnote 112 you
20 make a reference to the fact that individual D.A.
21 King was consulted by Senator Chip Rogers in
22 drafting Senate Bill 529, and you mentioned that
23 Senator Rogers was also a sponsor of the photo
24 identification requirements for voting. What is the
25 connection between those two things?

1 A The photo ID requirement for voting that I
2 was referring to is the one struck down as
3 unconstitutional by Judge Harold Murphy.

4 Q And my question was, how is Senator
5 Rogers's work in drafting Senate Bill 529 connected
6 to the fact that he was a sponsor for the photo
7 identification requirement? Why are you making a
8 connection there?

9 A Because it's an indication of his support
10 for placing difficulties in the path of voters as
11 consistent with -- actually, I guess it's not
12 relevant in the sense that SB 529 didn't relate to
13 voting, so I should have -- I should not have
14 mentioned that -- should not have included that
15 sentence because it's not an election bill.

16 Q In paragraph 55 after Governor Perdue's
17 quote you make the statement: The state's voting
18 process at the time, including a restrictive photo
19 identification requirement for in-person voting,
20 made the governor's claim of undocumented immigrants
21 voting extremely unlikely, unless local election
22 officials were routinely failing to enforce the law.

23 Do you agree that photo identification for
24 in-person voting helps avoid undocumented immigrants
25 from voting or illegal votes being cast?

1 A I agree it would do that. I also would
2 add that there are other provisions protecting
3 against illegal aliens from voting in state law and
4 in federal law.

5 Q Going to paragraph 56 you make a statement
6 at the end: Hispanic groups warned that Georgia's
7 immigration crackdown would turn conservative
8 Hispanic voters away from the Republican Party.

9 If that was correct, wouldn't the
10 Republican Party be undermining its own ability to
11 win elections?

12 A I'm not offering that as my own opinion as
13 much as I'm saying that's what the newspaper was
14 reporting -- the Associated Press story was
15 reporting, and I don't in fact -- I mean, I don't
16 know that there's evidence that there were a lot of
17 conservative Hispanic voters who voted for the
18 Republican Party. That's just a part of the
19 discussion of the issue that newspaper coverage
20 revealed. I'm not sure -- I'm not sure that it's
21 correct.

22 Q Moving to paragraph 57 on page 45, you're
23 discussing a study from the Georgia Budget & Policy
24 Institute.

25 A Yes.

1 Q And are you aware if the Georgia Budget &
2 Policy Institute is considered to be a liberal
3 organization?

4 A I have seen that somewhere, but this is a
5 detailed, documented report that I was quoting.

6 Q So you're not concerned about any
7 particular political leanings of GBPI because the
8 report was very detailed?

9 A Prior you were previously calling my
10 attention to a Brennan Center report. The Brennan
11 Center is also regarded as a liberal organization in
12 general, but it often does very good work in a
13 variety of different ways. And where there is
14 documentation for a point that is substantial, I pay
15 attention to -- whatever the political leanings of
16 the organization, I -- I'm focused on the evidence,
17 not on the political -- political leanings that are
18 attributed to an organization.

19 Q Let's move forward to paragraph 60 which
20 addresses House Bill 87 from 2011.

21 A Yes.

22 Q So you state that House Bill 87 was among
23 the most controversial pieces of legislation in the
24 2011 session. Was that based on the note from the
25 Georgia State Law Review?

1 A No, that particular statement is based on
2 all the newspaper coverage of the process by which
3 HB 87 was adopted and the demonstrations against it,
4 which were covered in the newspaper articles.

5 Q Okay. Was your conclusion based on the
6 newspaper coverage of House Bill 87?

7 A Yes. The Law Review note that I cited is
8 a detailed presentation of the legislative history
9 of HB 87 and a -- and an analysis of the content of
10 the bill.

11 Q Moving to paragraph 61.

12 A Okay.

13 Q You indicate that there was a provision
14 that appeared to forbid racial profiling in HB 87,
15 correct?

16 A Yes.

17 Q Wouldn't that be a good thing in the bill,
18 or was it your conclusion that it was basically
19 useless based on your later statements in that
20 paragraph?

21 A No, it would be a good thing. And, in
22 fact, the court relied on that statement as a way of
23 addressing the question of racial profiling as I
24 recall.

25 Q And --

1 A My point was simply it's a very general
2 reference to constitutional protection. It doesn't
3 specify any particular method of dealing with racial
4 profiling.

5 Q Okay. Would a prohibition on racial
6 profiling like in House Bill 87, would that be
7 something you would review if you were conducting a
8 review for discriminatory intent in the adoption of
9 House Bill 87, would that be relevant to that
10 component?

11 A Yes, that would be one piece of evidence.
12 In this case I hope you're not suggesting
13 that I am arguing that a provision that appears to
14 forbid racial profiling would be evidence of
15 discriminatory intent because that is not the case.

16 Q Oh, definitely not. No, I was asking more
17 generally, I'm sorry.

18 Let's move to paragraph 62, and you
19 indicate that the crackdown against undocumented
20 immigrants would threaten to cause problems with
21 traditional Republican constituencies. I guess one
22 of the things I struggled with was the immigration
23 discussion here is, is your report essentially
24 saying that the Republican majority is acting
25 irrationally when it passes immigration restrictions

1 because its key supporters oppose them, but it's
2 acting rationally when it's passing voting
3 restrictions because it serves a partisan interest?

4 A I'm not arguing they're acting
5 irrationally. I'm simply observing that the issue
6 of dealing with illegal immigration was more
7 important than their traditional -- than the
8 traditional Republican policies of assisting
9 business and the interest of agriculture.

10 In other words, it's a way of stressing
11 how salient the issue of illegal immigration was for
12 the Republican Party majority, and that observers
13 were pointing out the fact that business and
14 agricultural interests that benefited from illegal
15 immigration apparently were -- were often opposed to
16 the restrictions that the legislature was adopting
17 because of the economic difficulties it posed,
18 particularly to agriculture, but also for some
19 business interests where immigrant -- an immigrant
20 labor force was key.

21 Q So let's move forward to paragraph 66,
22 Problems with Election Administration and Database
23 Matching.

24 A Yes, I'm there.

25 Q So first you say the subsequent compliance

1 with HAVA, the Help America Vote Act, was spotty and
2 reflected an uncertain grasp of what HAVA requires.
3 I believe we talked about things earlier. Although
4 you teach some cases that involve election
5 administration, you don't have specialized training
6 or expertise in the administration of elections,
7 particularly as to compliance with HAVA, do you?

8 A I don't have that as a specialty, but I
9 did research on HAVA compliance in preparing this
10 report.

11 Q So have you ever prepared a report
12 previously involving a state's efforts at HAVA
13 compliance?

14 A No. What I'm relying on, of course, is
15 research on HAVA compliance in large part.

16 Q The last sentence of paragraph 66 says:
17 This was especially true of the state's flawed
18 implementation of HAVA's requirements when states
19 use electronic database matching to create a voter
20 verification program.

21 So you agree that a voter verification
22 program is required under the Help America Vote Act,
23 correct?

24 A Yes.

25 Q You just disagree with how Georgia had

1 gone about implementing its voter verification
2 requirement?

3 A If you mean I disagree -- that I'm
4 critical of how it operated and the effects of that
5 operation, yes.

6 Q So at the top of page 55 in paragraph 67,
7 the first full sentence says: The purpose of this
8 database matching was to identify the applicant as a
9 resident of the state and county and to confirm that
10 the person was a citizen of the United States.

11 So it's your testimony that the HAVA
12 requirements were designed to identify -- to confirm
13 citizenship as one component of the match, correct?

14 A Of course.

15 Q And then at the bottom of that paragraph,
16 the bottom of 67, you state that whether the
17 applicant was qualified under state law for
18 registration as a legal voter, in other words, was
19 left to the judgment of the states.

20 So you'd also agree that eligibility to
21 vote is also a question of state law, correct?

22 A Yes, and as the sentence concludes, that's
23 why it was subject to the preclearance requirements
24 of Section 5.

25 Q In paragraph 68 you discuss the Morales

1 case.

2 A Yes.

3 Q That case was a Section 5 enforcement
4 action, correct?

5 A I think that's right.

6 Q So a Section 5 enforcement action only
7 asks the question of whether a state had a change in
8 voting practices precleared, correct?

9 A That's the legal issue the court's allowed
10 to address, yes.

11 Q So a court would not be making a finding
12 related to the specific administration; the only
13 question is did you get it precleared or not, right?

14 A As I said, that's what they had the
15 authority to address, but the court made factual
16 findings about the specific plaintiff and his
17 experiences.

18 Q Do you know what the court ultimately
19 ordered in Morales as a remedy?

20 A I read the case. I don't recall, as I sit
21 here, how the case was finally resolved.

22 Q Okay. In paragraph 70 you state at the
23 end of that paragraph that "when DDS checks SAVE."
24 So is it your understanding the Department of Driver
25 Services is currently using the SAVE system to

1 verify citizenship of applicants for driver's
2 licenses?

3 A I didn't investigate what DDS is currently
4 doing. I was talking about what it was doing at
5 that time and how that relates to the state's -- the
6 Secretary of State's later claim that they had to
7 have SAVE in order to identify who was and wasn't a
8 noncitizen. DDS was using SAVE all along, as I
9 understand the facts from the sources I cited.

10 Q If DDS was not using SAVE all along to
11 verify citizenship, did that change your analysis or
12 your opinion in this case?

13 A Well, it certainly would be a different
14 fact from what I reported, and my recollection is I
15 was actually looking at the law, and I'm -- I'm
16 quoting from the DDS website which cited a Georgia
17 code provision. Are you saying that DDS was making
18 it up?

19 Q I'm just asking if it would change your
20 analysis if DDS was not using SAVE.

21 A It would change my analysis of that
22 particular point, yes.

23 Q And is it your understanding that Georgia
24 currently uses SAVE at any point for verifying
25 citizenship either through SSA or through DDS?

1 A I don't recall looking at that question as
2 to how the current -- how DDS currently operates.

3 Q If you could turn to page 59. You
4 indicate that SSA had signed user agreements with 46
5 states to use the HAVV system.

6 A I'm sorry, where are you referring me to?

7 Q Top of page 59.

8 A 59. Okay, I'm there.

9 Q And the Social Security Administration's
10 matching process is the same for all 46 states and
11 territories that use the HAVV process; is that
12 right?

13 A Yes.

14 Q Do you know how many or did you look at --
15 actually, let me ask it this way: Did you conduct
16 any analysis of what percentage of voters in the
17 voter verification process go through the HAVV
18 system from SSA?

19 A I remember that is addressed in Michael
20 McDonald's report in the 2016 case; I just don't
21 remember what percentage that was.

22 Q Okay.

23 A It's a smaller percentage. Most people go
24 through DDS verification, as I understand the facts.

25 Q In paragraph 74 on page 60, your last

1 sentence says: To be reliable, Georgia would have
2 to devise ways of checking and cleaning up its
3 database matching results to address these routine
4 human errors.

5 In your analysis of Georgia's voter
6 verification processes, did you look at the role of
7 registrars in reviewing the results of failures to
8 match?

9 A Yes, in general. That is to say, I looked
10 at the training materials that the registrars were
11 exposed to. I took account of the declaration of a
12 recently retired voter registrar from a rural county
13 in Georgia, who said that that was -- that while she
14 did that kind of checking, she was never -- she was
15 never exposed to training that mandated that or
16 required that, and she just thought it was a good
17 practice to do.

18 But my recollection of what Gary
19 Bartlett's expert report said, and he did analyze
20 the whole process, is that there was no requirement
21 that registrars do that that the states enforce. It
22 was obviously something that should have been done,
23 but the state -- Secretary of State's training
24 didn't really specifically require that as a part of
25 what registrars should do.

1 Q Going forward to paragraph 77, you
2 reference that: Georgia sought preclearance of its
3 newly revised voter verification process from a
4 three-judge court in the District of Columbia as
5 well as through administrative review by the
6 Department of Justice.

7 That's allowed by the Voting Rights Act to
8 pursue both tracks, correct?

9 A Sure.

10 Q You indicate at the end of that paragraph
11 that then Attorney General Thurbert Baker refused to
12 file the lawsuit. Are you aware of the prior
13 litigation between Governor Perdue and Attorney
14 General Baker regarding the scope of authority to
15 represent the state?

16 A I am not, and I'm simply reporting that as
17 what a newspaper article reported.

18 Q Paragraph 78 on the next page, you quote
19 the letter from the Department of Justice -- or
20 actually, I'm sorry, the federal court: The
21 department informed the plaintiff that it did not
22 intend to object to the implementation of the
23 revised verification process. And that's typical
24 language from the department, don't you agree, that
25 it's a failure to object, it's not an approval?

1 A That's correct.

2 Q And then you say in the next sentence:
3 The department agreed to preclear the process to
4 settle Georgia's lawsuit.

5 You're not saying the department was
6 forced to preclear in order to settle, correct?

7 A No. The point is if they didn't see a
8 basis for objection, they would settle the lawsuit.

9 Q Paragraph 79 you reference the training
10 materials from a 2015 presentation: For the
11 applicant who is registering to vote using their
12 driver's license number nothing changes.

13 Is it your understanding that those
14 individuals would not go through a matching process?

15 A No, that's not --

16 Q I'm sorry, I'm in the wrong section. I'm
17 sorry. We've already covered the piece I was going
18 to ask you about there.

19 So let me go to paragraph 80. Sorry,
20 Dr. McCrary. Are you doing good? You need a break
21 or you doing okay?

22 A Actually, if we can have a two-minute
23 break, that would be very helpful.

24 Q Certainly. Why don't we pause here and
25 take two minutes --

1 A Thank you.

2 Q -- and go off the record. Thank you.

3 (Recess 3:42-3:49 p.m.)

4 BY MR. TYSON:

5 Q Dr. McCrary, if you could move with me to
6 paragraph 80 of your report on page 65.

7 A Yes.

8 Q And in this paragraph you're describing
9 what is supposed to happen under the training
10 materials from the state if an individual fails a
11 verification process; is that fair to say?

12 A Yes.

13 Q There's a human check to determine if
14 there's transposition of numbers, problems with the
15 name, all those kinds of things, and the registrar
16 was able to correct that process, correct?

17 A That's correct.

18 Q Okay. You say at the end of paragraph 80:
19 In my opinion, if preclearance had still been in
20 effect, the department would have objected to these
21 overly technical identification requirements and the
22 Secretary of State's use of a pending list.

23 What are you basing that opinion on?

24 A Let me first review the paragraph in light
25 of that question.

1 That is reference to the notification
2 letter which Gary Bartlett described as extremely
3 difficult to follow for most people and to the
4 complicated steps that had to be followed if you
5 fail -- if a -- if an applicant failed a voter
6 verification system.

7 Q Yeah. So this is a reference to the
8 entirety of the voter verification process?

9 A No.

10 Q This is your opinion the department would
11 have objected to the pending list and to this
12 particular letter that went after 40 days?

13 A Had there been a voting change, and the
14 complication is that I'm not sure they -- the
15 information I had didn't make clear whether there
16 was a change that would have been subject to
17 preclearance before Shelby County was decided.

18 Q You talk at the beginning of paragraph 81:
19 The central focus of the state voter verification
20 process was its use of an inflexible and
21 unsystematic exact match procedure for database
22 matching.

23 Why are you describing the process that
24 way when there was a human check as you described in
25 paragraph 80 for individuals who failed the matching

1 process?

2 A Well, because it's not clear from the
3 evidence I have seen that that was actually done
4 systemically by the registrars.

5 Q So it's your opinion that although the
6 state was instructing and had a process for it, the
7 registrars weren't doing their job to follow that
8 process; is that fair?

9 A I haven't investigated whether they were
10 doing their job. I have just observed that, based
11 on the training materials, it doesn't appear as if
12 that was particularly stressed or certainly mandated
13 by -- by the state. But it's also -- the point I'm
14 making here is also that they were very much guided
15 by the failure of an applicant to match the voter
16 verification process through DDS or in some
17 instances through SSA, but the whole eNet system was
18 built around the failure to match.

19 Q In paragraph 82 you discuss expert
20 database matching that used several different
21 algorithms to provide a more accurate result.

22 A Yes.

23 Q I'm assuming you have not done any sort of
24 technical verification of DDS's computers to
25 determine if they're able to run those different

1 algorithms, correct?

2 A I have not. My understanding from
3 descriptions is that they did not do it. Whether
4 they had the capability of doing it, I'm not aware.

5 Q Skipping ahead to paragraph 86, you
6 indicate that the DDS exact matching procedure is a
7 primitive method that is no longer an accepted
8 practice in the field, I believe quoting from
9 Dr. McDonald's report. Do you see that statement?

10 A That's correct.

11 Q And you'd agree that the exact matching
12 process is still what's used by the Social Security
13 Administration, correct?

14 A Yes, and as I pointed out the Inspector
15 General in his report said that it was a very --
16 very faulty method because of the results it
17 produced.

18 Q Now, in these paragraphs kind of running
19 through your explanation of Dr. McDonald's report,
20 you are aware that the system Dr. McDonald analyzed
21 is no longer the law in Georgia, correct?

22 A That's correct, he was analyzing an
23 earlier period.

24 Q In paragraph 90, if you can skip ahead
25 there with me.

1 A Okay.

2 Q Last sentence you report Dr. McDonald's
3 conclusion that the practice of requiring an exact
4 match has a clear discriminatory effect, and is that
5 based solely on the overrepresentation of particular
6 racial groups versus their total population from the
7 prior paragraph?

8 A Yes. You mean Professor McDonald's
9 conclusion, yes.

10 Q Yes, that you're reporting.

11 A Yes.

12 Q In paragraph 91 you quote Dr. McDonald
13 again saying that a voter registration application
14 is effectively a literacy and writing test. Do you
15 agree with that statement?

16 A Well, the one caveat I would place here is
17 the term "application," as I understand it,
18 refers -- in that sentence refers to the whole
19 process, including the application form, but, more
20 particularly, the notification letter if the person
21 fails the voter verification first step, and the
22 process of using the state's website to deal with
23 how to satisfy the voter verification process. In
24 other words, the whole application process, not just
25 the application form itself.

1 Q Paragraph 93 on page 75 --

2 A Yes.

3 Q -- you make a note that the process was
4 especially difficult for individuals with lower
5 educational achievement. Are you relying solely on
6 Mr. Bartlett for that conclusion -- or that
7 statement, sorry?

8 A Sorry, where are you?

9 Q Paragraph 93.

10 A You mean --

11 Q 93, the first sentence.

12 A I am quoting him, but I also agree with
13 that.

14 Q But you're relying on him for that
15 statement. You haven't conducted an independent
16 analysis of the difficulty for individuals with
17 lower educational achievement?

18 A That's correct, but recall in the next
19 sentence I'm citing the literature of political
20 scientists writing about the relationship between
21 socioeconomic characteristics, such as educational
22 achievement, and participation in the political
23 process.

24 Q So, in other words, any government policy
25 that was difficult for individuals with lower

1 educational achievement would, by necessity, be --
2 also have a racially discriminatory effect?

3 A No, only if there was an observed racial
4 effect. I mean, not all persons with lower
5 educational achievement are members of a minority
6 group after all. Political scientists aren't just
7 referring to racial minorities when they talk about
8 the relationship between socioeconomic
9 characteristics and political participation.

10 Q Going to page 77, the last part of
11 paragraph 94 there at the top of page 77.

12 A Okay.

13 Q And you're concluding in short there were
14 consistent racial disparities in the socioeconomic
15 characteristics usually affecting participation
16 rates, and the same disparities are likely to have a
17 significant impact on the ability to remedy exact
18 match failures in the state's flawed voter
19 verification program.

20 The way I read this you're saying it's
21 likely, but you can't say for certain that it would
22 have a significant impact; is that right?

23 A That's correct, it's an inference I've
24 drawn.

25 Q On the next page you're discussing the

1 allegations of a lawsuit brought in 2016, and you
2 talk about the allegation of the cancellation rate
3 for African-American applicants was higher than that
4 rate for white applicants. What I want to ask about
5 is the next sentence you say: According to the
6 plaintiffs, the same discriminatory effect was clear
7 as well in non-matches on the question of
8 citizenship.

9 Is the use of "discriminatory effect" here
10 based solely on the fact that a cancellation rate
11 for African-Americans was higher than for white
12 voters?

13 A We're talking now about the complaint in
14 the case, right?

15 Q Correct.

16 A And I'm quoting from the complaint before
17 I started talking about the experts. Can you repeat
18 the question again now that I've clarified where we
19 are?

20 Q Certainly, and I'll put a finer point on
21 it here too. I understand that you're reporting
22 what the plaintiffs had claimed in this lawsuit. My
23 question is: The use of the word "discriminatory
24 effect" there, would you use the term
25 "discriminatory effects" to describe a process where

1 the cancellation rate for African-Americans was
2 higher than for white applicants alone, or would you
3 have to have more information to conclude there was
4 a discriminatory effect?

5 A So you're not asking about the next
6 sentence, which you did earlier, right? Citizenship
7 sentence.

8 Q What I'm zeroing in on is the "same
9 discriminatory effects," that phrase in the
10 "According to the plaintiffs" sentence on page 78.

11 A Uh-huh.

12 Q And your opinion in this case is that
13 there was a racially discriminatory effect of the
14 voter verification process.

15 A Yes.

16 Q Here we seem to be talking about a
17 discriminatory effect based solely on the
18 differential between the cancellation rate for
19 African-American applicants and white applicants.
20 So my question to you is: Is that all you need to
21 determine there's a racially discriminatory effect
22 is a differential rate, or do you need something
23 more than that?

24 A Well, differential rate of cancellation is
25 a very strong piece of evidence. Of course, there

1 is a lot more evidence deduced in the expert reports
2 I'm citing, and -- but if you're asking whether the
3 rates of rejection are sufficient to show a
4 discriminatory effect, the answer is yes.

5 Q Okay. Going to page 80, paragraph 98.

6 A Okay.

7 Q We're now to another piece of legislation
8 where you say undermines the equitable
9 implementation of the settlements about the voter
10 verification process. Do you know if anyone moved
11 to enforce the settlement agreement in that case as
12 a result of that legislation passing?

13 A You mean other than the fact that the
14 plaintiffs filed a subsequent lawsuit in the
15 aftermath of HB 268?

16 Q That's your understanding of the further
17 action after the settlement was the new lawsuit
18 filed in 2018?

19 A Yes.

20 Q Paragraph 99 on page 81 you again make a
21 statement of a law that would likely have been
22 objected to by the department. And you, as I
23 understood it, never reviewed the files on the old
24 voter verification process, you weren't involved in
25 that administrative preclearance process, right?

1 A That's correct.

2 Q And so what is the basis for your
3 statement that the administrative implementation of
4 House Bill -- HB 268 in 2017 would likely have been
5 objectionable? Objectionable, sorry?

6 A My knowledge of the standards applied by
7 the government in -- in enforcing the preclearance
8 requirement when it existed is the principal basis
9 for that along with the facts regarding HB 268 and
10 the context in which it was adopted, that is,
11 immediately following the settlement agreement of
12 the 2016 lawsuit.

13 Q Later in paragraph 99, you state: Because
14 the state now implemented voting changes -- sorry,
15 top of page 82: Because the state now implemented
16 voting changes with a racially discriminatory effect
17 knowing that it would have that effect, this voting
18 change would have been adopted with a racially
19 discriminatory purpose.

20 So I read this as you're saying that there
21 was discriminatory intent in the adoption of House
22 Bill 268; is that right?

23 A That's inartfully worded. What I meant
24 was that it would have been objectionable under the
25 intent or purpose prong of Section 5 review, that is

1 to say that the state could not have met its burden
2 of proving that it didn't have a discriminatory
3 purpose because of the strong evidence presented in
4 the 2016 lawsuit that had caused the state to settle
5 that voting case in a way that satisfied the
6 plaintiffs.

7 Q So this isn't saying this was
8 discriminatory intent for purposes of the 15th
9 Amendment --

10 A No.

11 Q -- this is lack of being able to meet
12 Section 5 standard for preclearance, correct?

13 A That's correct. That's why I said it was
14 inartfully worded on my part. I apologize.

15 Q We can go forward to paragraph 104 on page
16 85.

17 A Okay.

18 Q You relate the story of Mr. Oren and his
19 experience sending in his application with his
20 naturalization certificate. Do you recall what
21 county Mr. Oren -- what county registrar Mr. Oren
22 was dealing with?

23 A I don't recall with any precision. I have
24 a general sense -- I mean, I have -- I have a
25 recollection that I'm not comfortable relying on

1 that it was Fulton County.

2 Q I thought it was Fulton as well. I hadn't
3 gone back and checked. We're both thinking the same
4 thing.

5 A Don't take that to the bank. I don't
6 recall with sufficient clarity.

7 Q Certainly. So let's go forward to
8 paragraph 108 on page 88.

9 A Okay.

10 Q And this is reporting the racial makeup of
11 individuals flagged as potential noncitizens from
12 Dr. McDonald's declaration. Do you know if
13 Dr. McDonald looked at the pool of -- sorry. Do you
14 know what basically the denominator was for
15 Dr. McDonald's conclusions here what group was he
16 looking at? Was he looking at all applicants, all
17 voters, or was he looking at only voters who
18 submitted a paper application, do you know? I think
19 it was to all voters.

20 A My recollection is it was to all
21 applicants, but I would naturally prefer reviewing
22 the report to check my recollection.

23 Q Certainly. So let's go forward to page 91
24 and paragraph 112.

25 A Okay.

1 Q And so you now were reporting the adoption
2 of House Bill 316, which I believe we mentioned
3 earlier.

4 A Yes.

5 Q And so you'd agree that the law on
6 Georgia's voter verification process has changed,
7 correct?

8 A Yes.

9 Q And you say at the end -- on the next page
10 at the end of paragraph 112 that whether House Bill
11 316 fully resolves the issues in the exact match
12 case remains to be seen. And so we're -- we're at a
13 point of we're not sure if that's going to be enough
14 to satisfy the judge in that case, or what do you
15 mean in terms of resolve the issues in the exact
16 match case?

17 A Well, as I recall HB 316 hasn't been
18 implemented in an election, has it?

19 Q We have one coming up in a couple weeks.

20 A You used the future test there, right?

21 Q We had to delay -- it should have already
22 happened by now, but we had to push it out because
23 of COVID.

24 A Yes.

25 Q So when you say resolve the issues in the

1 exact match case, you're saying you need to see an
2 election run using the provisions of House Bill 316
3 to make that determination?

4 A At a minimum, yeah.

5 Q Let's forward to page 95, paragraph 117.

6 A Okay.

7 Q And you referenced that voters who failed
8 the verification process were to be classified as
9 active with an MIDR requirement. You report that
10 Dr. Mayer says those individuals face additional
11 identification requirements. Your understanding, is
12 it consistent with Dr. Mayer's that MIDR means
13 additional identification requirements or fewer
14 identification requirements under Georgia law?

15 A Would you repeat your question?

16 Q Sure. It was a terribly worded question.

17 Is it your understanding that a voter who
18 is flagged active with an MIDR flag faces additional
19 identification requirements or fewer identification
20 requirements than an active status voter?

21 A I'm still not sure I understand your
22 question.

23 Q Okay. Let me try -- take another run at
24 it. You're reporting in paragraph 117 that
25 individuals who are in MIDR status because they

1 failed verification face additional identification
2 requirements, and you're relying on Dr. Mayer for
3 that statement. You see where that is in the middle
4 of 117?

5 A Yes, that's what he's saying, but I'm
6 still not sure I understand your question.

7 Q My question is: Did you do any analysis
8 of what MIDR status means?

9 A Yes. I don't recall with any
10 particularity, as I sit here, exactly what I found,
11 but I did look -- I did read documents that
12 explained exactly what it meant.

13 Q And so it's your understanding that MIDR
14 status means additional identification requirements
15 for a voter, correct?

16 A Well, it means that they have to supply --
17 they have to supply identification because it was
18 not -- it was not evident in the -- in the voter
19 verification process. It may already have been in
20 their files, for example, or they may have -- they
21 may possess documentation showing, for example, that
22 they were naturalized, so that -- that's what I
23 believe Professor Mayer meant when he referred to
24 additional identification requirements.

25 You know, part of the problem seems to be,

1 according to, I think, Gary Bartlett's analysis and
2 some of the other documents I saw, is that
3 registrars don't always check their files to see
4 what's actually in their files because there are
5 examples of persons who were naturalized citizens
6 and showed the documentation when they first
7 applied, and the registrar hadn't -- hadn't picked
8 up on what was actually in their file, their
9 application file.

10 So, you know, the point is they have to
11 supply identification which -- even if it's in the
12 file, I think it's providing additional
13 identification.

14 Q And when you -- Mr. Bartlett has not
15 reviewed the new process that exists under House
16 Bill 316 and the official election bulletin issued
17 pursuant to that statute, right?

18 A That's correct. His report was in 2016.

19 Q Let's go to page 97.

20 A Okay.

21 Q Paragraph 120 -- paragraph 120 you
22 reference individuals who were in pending status for
23 reasons other than citizenship verification. Do you
24 see that?

25 A Yes.

1 Q Last sentence says: Again these data
2 reveal an impact of these missing data "falls most
3 heavily on minority registrants." See that
4 statement?

5 A I'm not seeing it. Where is it?

6 Q The last sentence of paragraph 120.

7 A Yes.

8 Q It's not your testimony if a voter doesn't
9 sign his or her voter application that that
10 application should be put into active status, right?

11 A I'm sorry? Would you repeat the question?

12 Q You say -- yes. It's not your testimony
13 that a voter who does not sign a voter registration
14 application should have that application put into
15 active status, correct?

16 A I don't know why that's inferred from
17 anything in paragraph 120.

18 Q First sentence of paragraph 120 says
19 individuals that you're identifying with continuing
20 racial disparity are in that status because of
21 missing information or lack of a signature.

22 A That's what Professor Mayer was saying,
23 yes.

24 Q Right. And so my question is: You're not
25 saying that voter registration applications that

1 lack a signature should be processed with no further
2 action by the registrar, are you?

3 A The registrar should call attention of the
4 applicant to the fact that he didn't sign -- he or
5 she didn't sign the document.

6 Q And do you know if that's the process
7 that's used in Georgia if there's missing
8 information like that?

9 A I don't -- I don't know that it is or
10 isn't because I haven't investigated all the actions
11 of the registrars, but I -- I think that if you
12 recall the declaration of the former registrar whose
13 name I'm blanking on at the moment that I cited
14 earlier, she said she would have checked, and she
15 would have presumably contacted the citizen who
16 applied to say you didn't sign your application
17 form. That's just routine, good practice.

18 Q Let's move to the conclusion section of
19 your report on page 98.

20 A Okay.

21 Q First of all we have, kind of again coming
22 back to our structure, paragraph 122 summarizes your
23 opinion about the persistent discriminatory effects
24 on minority voters' opportunity to register and vote
25 by Georgia's implementation of its voter

1 verification process under HAVA; that correct?

2 A Yes.

3 Q In that paragraph you refer to a
4 cumbersome and decentralized system of
5 decision-making of individual voter verification.
6 Did you discuss that somewhere in the report because
7 I don't remember addressing the cumbersome and
8 decentralized system of decision-making directly in
9 the report.

10 A You were asking me questions about part of
11 what I was discussing in that sentence already in
12 this deposition. The decentralized system is a
13 system in which the Secretary of State's office has
14 some role in the process in carrying out the voter
15 verification process of the databases, and then the
16 state relies on each local registrar or board of
17 registrars to make the final decision. That's what
18 I meant by decentralized system.

19 The cumbersome reference is to the -- the
20 character of the exact match system, which is
21 cumbersome and inaccurate and flawed and achieves
22 more disenfranchising effect than would be
23 justified.

24 So I think we've covered that a good bit
25 in this deposition because it's covered a good bit

1 in the report.

2 Q Okay. Then paragraph 123 seems to go to
3 your second major area, the current pattern has its
4 analogue in the system of voter registration in the
5 Jim Crow era before 1965. Then you make a
6 comparison to the complexity of the literacy test
7 used by Georgia between 1945 and 1965 with the
8 difficulties that minority voters face in dealing
9 with Georgia's voter verification system since 2008.
10 You're a historian. You study history. Do you
11 really think it is -- it's comparable to the
12 disenfranchisement of the Jim Crow law? That's what
13 you're saying in this report, and that's a pretty
14 bold statement to me.

15 A First of all, you're talking about
16 problems of vote denial or abridgment in both
17 instances. It's not a question of dilution.

18 Secondly, there is an observed
19 discriminatory effect against minority citizens in
20 both periods. The discrimination was more dramatic
21 in its -- in its numerical effects in the period
22 before 1965, but there's -- there is a
23 discriminatory effect in both patterns.

24 It's also true that there is evidence of
25 intentional discrimination in the application of the

1 literacy tests and other aspects of the registration
2 process in Georgia before 1965, and I'm not -- I'm
3 not actually concluding that there is a
4 discriminatory intent underlying the use of voter
5 verification system by Georgia in the current -- in
6 the current system, but I do see similarities. But
7 obviously they are somewhat different as well as
8 somewhat similar.

9 Q Then paragraph 124 covers the third area,
10 the resembling of the politics of Georgia before the
11 1965 Voting Rights Act. I know we covered this,
12 but, again, at the very last sentence you referenced
13 a powerful incentive for Republican officials to
14 place hurdles in the path of minority citizens
15 seeking to register and vote, but there is no
16 testimony here that that is intentional in this --
17 in this report, correct?

18 A That's correct.

19 Q Dr. McCrary, do you have any other
20 opinions related to the issues in this case that are
21 not addressed in your report or that we have not
22 covered today in this deposition?

23 A Not that I -- not that I can think of.

24 Q Okay. Sitting here today you can't think
25 of any others?

1 A No. I suppose I could be asked questions
2 in trial testimony that would raise another issue
3 that I didn't address in the report, and to answer
4 the question I might have to address the subject
5 matter of the question, but it's not -- it's not my
6 intention to offer an additional -- an additional
7 opinion unless there were a rebuttal report
8 criticizing my analysis, in which case I would
9 expect to be able to reply.

10 Q Certainly. Thank you. And for your
11 reference, we are not planning to offer a rebuttal
12 report to your report, so we'll be in good shape
13 there.

14 A Okay.

15 Q Dr. McCrary, that's all the questions I
16 have. Ms. Fink may have some questions for you, or
17 we'll see where we go from here.

18 MS. FINK: If we can take a break. We can
19 go off the record. Let's take just a 10-minute
20 break.

21 MR. TYSON: Certainly.

22 (Recess 4:26-4:30 p.m.)

23 MS. FINK: I don't have any questions for
24 Dr. McCrary.

25 MR. TYSON: Well, thank you for your time,

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1 Dr. McCrary. Hope you have a good weekend.

2 THE WITNESS: Do my best.

3 (Deposition concluded at 4:30 p.m.)

4 (Signature reserved.)

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1 The following reporter and firm
2 disclosures were presented by me at this proceeding
3 for review by counsel:

4 REPORTER DISCLOSURES

5 The following representations and
6 disclosures are made in compliance with Georgia Law,
7 more specifically:

8 Article 10 (B) of the Rules and
9 Regulations of the Board of Court Reporting
10 (disclosure forms)

11 OCGA Section 9-11-28 (c) (disqualification
12 of reporter for financial interest)

13 OCGA Sections 15-14-37 (a) and (b)
14 (prohibitions against contracts except on a
15 case-by-case basis).

16 - I am a certified court reporter in the State of
17 Georgia.

18 - I am a subcontractor for Veritext.

19 - I have been assigned to make a complete and
20 accurate record of these proceedings.

21 - I have no relationship of interest in the matter
22 on which I am about to report which would disqualify
23 me from making a verbatim record or maintaining my
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25 Code of Professional Ethics.

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- Transcripts: The transcript of this proceeding as
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record of the colloquies, questions, and answers as
submitted by the certified court reporter.

- Exhibits: No changes will be made to the exhibits
as submitted by the reporter, attorneys, or
witnesses.

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1 - Password-Protected Access: Transcripts and
exhibits relating to this proceeding will be
2 uploaded to a password-protected repository, to
which all ordering parties will have access.

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CERTIFICATE

STATE OF GEORGIA:

COUNTY OF FULTON:

I hereby certify that the foregoing transcript was taken down remotely, as stated in the caption, and the colloquies, questions and answers were reduced to typewriting under my direction; that the transcript is a true and correct record of the evidence given upon said proceeding.

I further certify that I am not a relative or employee or attorney of any party, nor am I financially interested in the outcome of this action.

I have no relationship of interest in this matter which would disqualify me from maintaining my obligation of impartiality in compliance with the Code of Professional Ethics.

I have no direct contract with any party in this action and my compensation is based solely on the terms of my subcontractor agreement.

Nothing in the arrangements made for this proceeding impacts my absolute commitment to serve all parties as an impartial officer of the court.

Tl



ROBYN BOSWORTH, RPR, CRR, CRC, CCR-B-2138

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1 To: Sarah Fink

2 Re: Signature of Deponent Payton McCrary

3 Date Errata due back at our offices: 30 Days

4
5 Greetings:

6 This deposition has been requested for read and sign
7 by the deponent. It is the deponent's
8 responsibility to review the transcript, noting any
9 changes or corrections on the attached PDF Errata.
10 The deponent may fill out the Errata electronically
11 or print and fill out manually.

12 Once the Errata is signed by the deponent and
13 notarized, please mail it to the offices of Veritext
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15 When the signed Errata is returned to us, we will
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20 above, the original transcript may be filed with the
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3 read the transcript of my testimony, and that

4 ___ There are no changes noted.

5 ___ The following changes are noted:

6
7 Pursuant to Rule 30(7)(e) of the Federal Rules of
8 Civil Procedure and/or OCGA 9-11-30(e), any changes
9 in form or substance which you desire to make to
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11 with a statement of the reasons given for making
12 them. To assist you in making any such corrections,
13 please use the form below. If additional pages are
14 necessary, please furnish same and attach.

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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